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Abstracting

THE IMPACT OF THE EUROPEAN COURT OF HUMAN RIGHTS ON JUSTICE SECTOR REFORM IN THE REPUBLIC OF MOLDOVA

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Abstract

For this study, I reviewed the judgments of the European Court of Human Rights against the Republic of Moldova and the corresponding reports of the Committee of Ministers from 1997 through 2014. In addition, I interviewed more than 25 lawyers, judges, and human rights advocates. After analyzing the effectiveness of the Court in terms of compliance with the judgments in specific cases (individual measures), I will assess the broader impact of these decisions (general measures) on legal reforms and public policy in the Republic of Moldova. I will evaluate the effectiveness of the decisions of the ECtHR in the context of the implementation of Moldova's Justice Sector Reform Strategy (2011-2015), the Council of Europe's Action Plan to Support Democratic Reforms in the Republic of Moldova (2013-2016), and Moldova's National Human Rights Action Plan (2011-2014). My findings will offer insights into the constraints faced by the ECtHR in implementing its decisions and the impact of the ECtHR on national legal systems.

Keywords: European Court of Human Rights; Moldova; human rights; judicial reform

INTRODUCTION

The Republic of Moldova recently observed the 20th anniversary of Moldova's accession to the European Convention of Human Rights. From the first judgment against Moldova in *Metropolitan Church of Bessarabia and Others*, 45701/99, 27 March 2002 through 2016 the European Court of Human Rights issued 339 judgments involving Moldova (Council of Europe, Statistics). Here I will assess the impact of decisions of the European Court of Human Rights on legal and judicial reform in the Republic of Moldova.

For this study, I reviewed the judgments of the European Court of Human Rights against the Republic of Moldova and the corresponding reports of the Committee of Ministers (responsible for supervising the execution of the judgments) from 1997 (after Moldova ratified the European Convention on Human Rights) through 2014. In addition, I interviewed more than 25 lawyers, judges, and human rights advocates, including the President of the Supreme Court of Justice (and former judge on the ECtHR), the Vice Minister of Justice, and the Government Agent. After analyzing the effectiveness of the Court in terms of compliance with the judgments in specific cases (individual measures), I will assess the broader impact of these decisions (general measures) on legal reforms and public policy in the Republic of Moldova. I will evaluate the effectiveness of the decisions of the ECtHR in the context of the implementation of Moldova's Justice Sector Reform Strategy (2011-2015), the Council of Europe's Action Plan to Support Democratic Reforms in the Republic of Moldova (2013-2016), and Moldova's National Human Rights Action Plan (2011-2014). My findings will offer insights into the constraints faced by the ECtHR in implementing its decisions and the impact of the ECtHR on national legal systems.

EUROPEAN COURT OF HUMAN RIGHTS AND THE REPUBLIC OF MOLDOVA

The European Court of Human Rights (ECtHR) "performs its most important governance functions through the building of precedent-based caselaw." (Keller and Sweet, 14). And the precedent-based caselaw of the ECtHR is constitutionally required to be applied in Moldova's courts.[1] The ECtHR is, therefore, in the position to have a positive impact on improving the human rights situation in Moldova. During the last four years petitioners have filed about 1,000 applications to the ECtHR per year, and

[1] Article 4 of the Moldovan Constitution provides "(1) Constitutional provisions concerning human rights and liberties shall be interpreted and applied according to ...the international treaties Republic of Moldova is party to. (2) In case of inconsistencies between human rights covenants and treaties to which the Republic of Moldova is party, and its internal law, priority shall be given to international regulations." In 1999 the Constitutional Court of the Republic of Moldova adopted a judgment (Number 55) in which it explained how Article 4 of the Constitution would be applied.

Moldova has consistently ranked in the top six countries in terms of per capita filings.[2] Of the 4,500 applications, the ECtHR found that about 1,000 were admissible (Interview with Judge Poalelungi). The average percentage of applications found admissible is 5%, whereas for Moldova that figure is 30% (Interview with Judge Poalelungi). Thus, Moldova's rate of admissible cases is six times higher than that of other developing countries (Interview with Judge Poalelungi). In 2012, Moldova ranked 8th in the raw number of pending cases before the ECtHR allocated to a judicial formation. (ECtHR, Annual Report 2012) Currently there are about 4,000 pending applications by Moldovan citizens before the ECtHR (ECtHR Moldova Country Report).

By the end of 2016, there were 339 judgments against Moldova, finding more than 50 types of violations: 124 (37%) involved the Right to Fair trial, 106 (31%) involved Protection of Private Property, and 80 (24%) involved Inhuman or Degrading Treatment (ECtHR, Overview: 1959-2016). More than half of the judgments against Moldova are in the area of criminal procedure and criminal law, torture and ill treatment (Interview with Judge Raisa Botezatu). The below graphic prepared by the ECtHR represents the allocation of the types of ECtHR judgments against Moldova (ECtHR, Statistics):

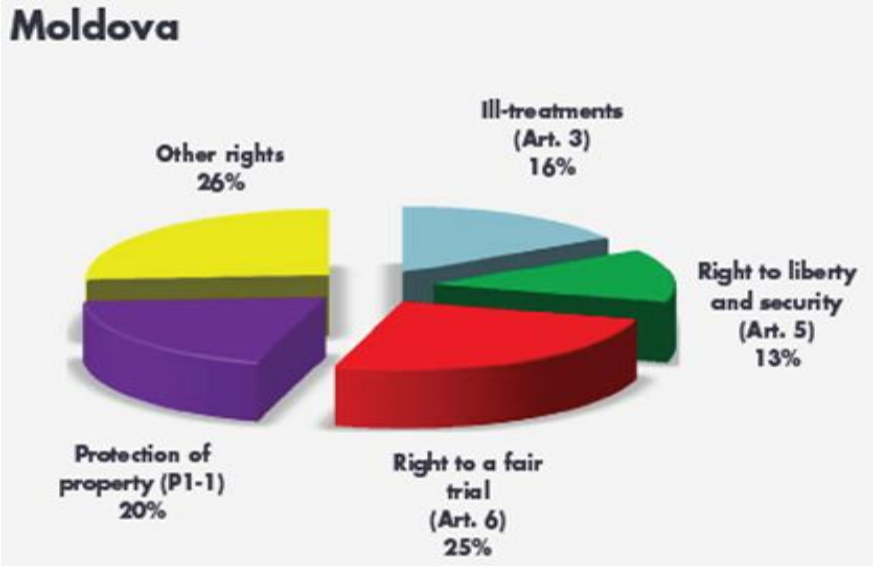

Figure 1. Types of ECtHR Judgments against Moldova

More than two million euros in just satisfaction was awarded in these cases in the last six years (ECtHR, Department for the Execution of Judgments, Moldova Country Fact Sheet, 2017).

[2] In 2009, Moldova ranked 3rd (behind Georgia and Liechtenstein), in 2010 Moldova ranked 6th, in 2011 Moldova ranked 3rd, and in 2012 Moldova ranked 6th. European Court of Human Rights Annual Report.

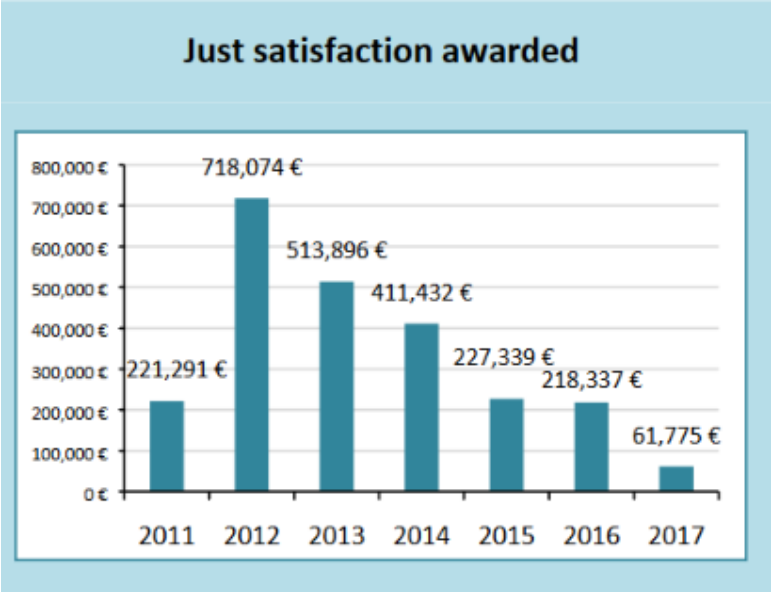

Figure 2. Moldova: Just Satisfaction Awarded 2011-2016

Whether and how these decisions are implemented and the extent to which these ECtHR precedents can affect legal and judicial reform in the Republic of Moldova is the subject of my long-term study. Judge Poalelungi (former judge on the ECtHR, current Chief Justice of the Supreme Court of Moldova) believes that Moldova is a positive example for other states, pointing out that Moldova has a stronger record of implementation than states like Russia and Turkey. However, recent headlines have claimed that "Moldova ranks in list of countries that mostly delay ECHR judgment execution." (Interview with Judge Poalelungi).

Moreover, the Republic of Moldova is consistently one of the main states with cases under enhanced supervision by the Court. Cases require "enhanced supervision" due to the nature of the problem (these cases also include those concerning urgent individual measures)." (Department for the Execution of Judgments of the ECtHR, Statistics).

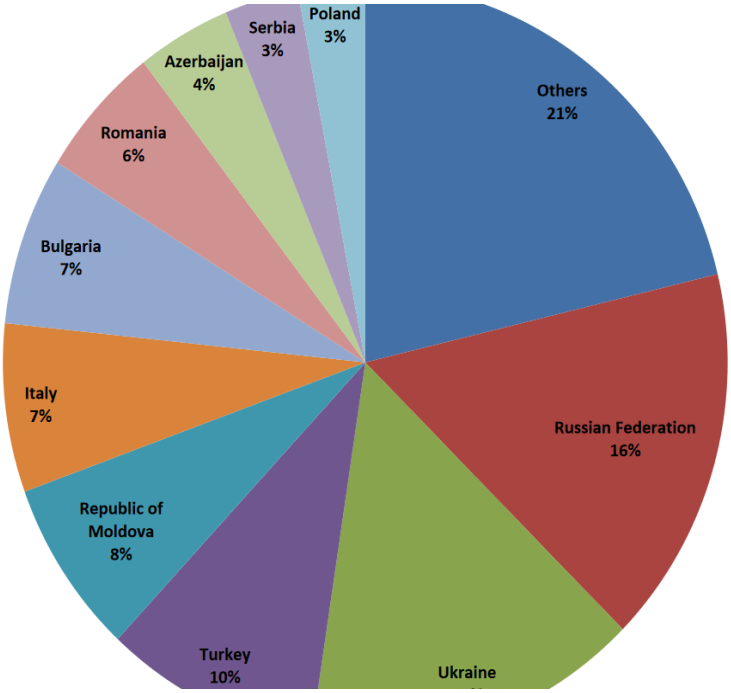

Figure 3. Main States with Cases under Enhanced Supervision 2015

The main issues before the Committee of Ministers requiring ongoing supervision include the following: actions of security forces (use of force and effectiveness of investigations), conditions and lawfulness of detention medical care), lawfulness of detention and related issues, breaches to the right to liberty and security in the context of unlawful detention, enforcement of final domestic judgments, domestic violence, and the right to peaceful assembly (ECtHR, Department of Execution and Judgment, Moldova Country Fact Sheet). The Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights issued a report in 2012 "Implementation of Judgments of the European Court of Human Rights: Republic of Moldova, Poland and Romania" in which it drew attention to the "difficult situation of non-implementation of judgments" of the ECtHR in a number of states [including Moldova] in which (major) structural problems have led to repeat violations." The following year, the Commissioner for Human Rights of the Council of Europe visited Moldova, and in his report he explained that "the non-enforcement or delayed enforcement of final judicial judgments issued by national courts has been identified by the European Court of Human Rights in a pilot program as being the most significant problem in the Republic of Moldova in terms of the number of applications pending before the Court. The Commissioner urges the Moldovan authorities to take resolute steps to address this structural problem at the

domestic level through a speedy and effective remedy which secures adequate and sufficient redress." (Muiznieks, 2013).

Reflecting on the high number of cases filed before the ECtHR from Moldova, Judge Poalelungi, President of the Supreme Court of Justice of the Republic of Moldova, explained that it "tells us about the malfunction of the judicial system in general, and the lack of trust of Moldovan citizens to the judicial system." The large number of filings also reflects the work of an active cohort of well-trained lawyers who are bringing these cases to the ECtHR. One Rule of Law expert noted that among Moldovan lawyers there is an awareness of the court in Strasbourg and a "waking up to the opportunity to bring cases before the ECtHR." (Interview with Judge Dag Brathole). I interviewed many of these lawyers, who work for NGOs such as the Human Rights Embassy, the Legal Resource Center, Lawyers for Human Rights, and Promo-LEX.

For example, the Legal Resource Center is an NGO specialized in litigating cases before the ECtHR. The LRC conducts trainings for judges and for prosecutors. They also translate judgments of the ECtHR into Romanian, the state language. There were more than 4,000 text pages to translate into Romanian between 2006 and 2010 (Interview with Vlad Gribincea). Similarly Lawyers for Human Rights, founded in 2001, organizes trainings for judges and lawyers, translates judgments against the Republic of Moldova into Romanian, and strategically brings cases and represents litigants before the ECtHR (Interview with Vitale Zama). The Human Rights Embassy, an offshoot of Amnesty International, has trained more than 180 lawyers to be human rights defenders and how to bring good applications before the ECtHR (Interview with Lela Metreveli). Currently, they are implementing a program of electronic education for lawyers in human rights from five CIS countries. It is a one-year distance learning course for 125 defense lawyers from five countries, 25 of whom are from Moldova. The Human Rights Embassy is now focusing on domestic courts and training defense lawyers how to use international standards and the ECHR before domestic courts and encouraging Moldovan judges to apply ECtHR precedents (Interview with Lela Metreveli).

The ECtHR developed a Case Law Translation Program, a 4-year program initiated to translate leading cases selected by the Court's Bureau into 12 target languages, including Romanian) with the support of the Human Rights Trust Fund (HRTF).[3] According to the 2016 Council of Ministers report, this program produced more than 3,500 translations before it ended in 2016 (Council of Ministers, 2016 Annual Report). A stakeholder survey found that more than 90% of the respondents were satisfied with the translations and that more than 90% had the opportunity to use the translations in legal practice, education and training, or in decision-making (Committee

[3] Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Montenegro, Republic of Moldova, Serbia, the Former Yugoslav Republic of Macedonia, Turkey and Ukraine. See Council of Europe Committee of Minsters. 2016 Annual Report. http://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf

of Ministers Annual Report 2016). Now that this program has concluded, domestic agencies will need to continue the work of translating or summarizing significant caselaw handed down by the ECtHR.

Those interviewed for this study were in agreement that there are no longer delays in Moldova's making payments of just satisfaction pursuant to the ECtHR's Individual Measures. However, there was less confidence in whether changes in laws and policies are being enacted and implemented pursuant to the ECtHR's General Measures are able to bring about deep reform.

As a leading human rights lawyer in Moldova explained, it is "not a question of change of legislation but of the mentality of judges. The *laws* are more or less in line with standards of the ECHR; the problem is with the *application* of the laws." (Interview with Vlad Gribincea). Judge Raisa Botezatu, who has served as a judge in Moldova for more than 30 years (including service as President of the Supreme Court of Justice and working closely with the Council of Europe to prepare a report about the compatibility of Moldova's laws with the European Convention on Human Rights prior to its ratification in Moldova) lamented that "Unfortunately we did not and still do not have a willingness to do strong and deep reform." (Interview with Judge Botezatu).

Justice Sector Reform

Insofar as a bulk of the filings before the ECtHR deals with criminal due process and the administration of justice, justice sector reform is needed to improve the human rights situation in the Republic of Moldova. A number of groups have been working with the government of Moldova over the last 20 years to improve the justice sector and to establish a stable rule of law environment: the American Bar Association Rule of Law Initiative (ABA ROLI), the Norwegian Mission of Rule of Law Advisors to Moldova (NORLAM), the U.S. Agency for International Development (USAID), and the OSCE have been most active partners in these endeavors.

Examples of their projects include the USAID donation of computers and software to provide for randomized case management (while the system does not address corruption directly, it is expected to improve transparency), ABA ROLI's conference on strengthening precedent in Moldova and their work preparing and printing casebook that includes the most important cases Moldovan criminal law and criminal procedure (a reference manual for lower court judges and prosecutors) and NORLAM's trainings for judges about the importance of the ECtHR caselaw and how to apply in their decisions (Interviews with Ina Pislaru, USAID; Judge Richard Grawey, ABA ROLI; Judge Torolv Groseth, NORLAM).

Moldova's legal system is based on the civil law tradition, so judge's decisions are not to be precedent-based. Yet Moldovan judges are expected to apply the precedents of the ECtHR, which creates this predicament: Moldovan judges are bound by precedents of the judges of the ECtHR in Strasbourg, but not decisions made by Moldova's Supreme Court of Justice in Chisinau. The principle of justice inherent in the Common Law tradition of *stare decisis* is that similarly situated litigants will be treated similarly. Many reformers in Moldova have concerns about the lack of uniform judicial practice and worry about the many occasions when the same judges apply different solutions in similar cases (Interview with Vitale Zama). One human rights lawyer explained that "There needs to be legal certainty -- parties should know what will happen in a case." (Interview with Vitale Zama). This can be ensured when judges are using legal reasoning and applying precedents. The President of the Supreme Court of Justice is working to encourage changes at the national level to improve the overall judicial process, one of which is to try to combine civil law with common law tradition, specifically to give the Supreme Court of Justice the ability to issue Advisory Opinions to offer clarifications for lower courts (Interview with Judge Poalelungi). This would provide for the uniform application of the law and would be a way to introduce the concept of precedent into the Moldovan legal system (Interview with Judge Poalelungi).

There is a massive judicial reform effort underway in Moldova – the Justice Sector Reform Strategy – developed and implemented by the Ministry of Justice. In 2011 Moldova's Parliament adopted legislation that embarked on a major Judicial Reform Strategy that was accompanied by a detailed action plan (a timeline with measurable goals that would be implemented within five years, by 2015). "Determining factors" for embarking on this strategy, as outlined in the Strategy, included the following: a significantly low level of public confidence in the judicial system's effectiveness and fairness, aspirations to join the EU, the perception of the high degree of corruption in the justice sector, and the creation of a favorable environment for economic growth and attraction of investments (Justice Sector Reform Strategy). The overall objective of the Strategy "is to build an accessible, efficient, independent, transparent, professional justice sector, with high public accountability, consistent with European standards and ensuring the rule of law and protection of human rights." (Justice Sector Reform Strategy). Specific objectives of the Strategy include the following:

- Strengthen the independence, accountability, impartiality, efficiency and transparency of the judiciary;
- Streamline the process of pre-trial investigation and prosecution, as needed to safeguard human rights, ensure individual security and reduce the level of crime;
- Improve the institutional framework and processes that ensure effective access to justice:

- effective legal aid, examination of cases and enforcement of court decisions within a reasonable time, upgrading the status of some legal profession s related to the justice system;
- Promote and implement the principle of zero-tolerance to corruption in the justice sector;
- Implement measures that will allow the justice sector to contribute to the creation of a favorable environment for sustainable economic development;
- Ensure effective observance of human rights within judicial practices and policies;
- Coordinate and define powers and responsibilities of key actors within the justice sector and ensure cross-sectoral dialogue.

The Justice Sector Reform Strategy and Implementation Plan has seven pillars, according to the Ministry of Justice website:

Pillar I. The Judicial System,
Pillar II. Criminal justice,
Pillar III. Access to justice and enforcement of court decisions,
Pillar IV. The integrity of actors operating in the justice sector,
Pillar V. The role of the justice system in economic development,
Pillar VI. Human rights in the justice sector,
Pillar VII. Well-coordinated, managed and accountable justice sector.

The Ministry of Justice formed Working Groups for each pillar to develop and to monitor the progress of reform. The action plan is driven by EU assistance. There are different stakeholders monitoring progress with each of the pillars. NORLAM, for example, is monitoring Pillar 2 (Interview with Judge Groseth).

The reform plan is quite ambitious. Many interviewees expressed skepticism that all goals associated with all seven pillars could be implemented within five years, but there was optimism that this Justice Sector Reform and Action Plan could lead to significant improvements in judicial administration in Moldova.

In 2013 the Commissioner for Human Rights of the Council of Europe issued a call to action in the form of a release titled "Judicial Reform needs to be accelerated in the Republic of Moldova." (Commissioner for Human Rights, 2013). While noting that "[t]he Justice Sector Reform Strategy for 2011-2016 is a major undertaking" in the right direction, Commissioner Muiznieks also emphasized that "the reform process needs to be supported by adequate funding and concrete political measures." (Commissioner for Human Rights, 2013). The Commissioner also noted that "[t]he budget of Moldovan courts is twenty times less than the median of Council of Europe member states and judges are not properly shielded from undue political pressure." (Commissioner for Human Rights, 2013).

Moreover, the Council of Europe Committee on Legal Affairs and Human Rights noted that "[d]espite some positive measures, corruption remains wide-spread and the perception of corruption remains high, with the judiciary perceived as the branch most affected by this phenomenon." (Committee on Legal Affairs and Human Rights, 2017).

The European Commission High Representative of the Union for Foreign Affairs and Security Policy took note of some reforms adopted pursuant to the 2011-2016 strategy (Implementation Report 2017). For example, "a reform of the judicial map was adopted in 2016, which reduces the number of courts. This should lead to better case management, efficiency and savings thanks to specialization of judges. A new version of the Integrated Case Management System is currently being developed to eliminate manipulation of cases." Moreover, the European Commission noted in its Implementation Report that "a new law on the Prosecution Service entered into force in August 2016, in line with Venice Commission recommendations. It is meant to strengthen the independence of the prosecution service. The reform aims to limit the powers of the prosecution service, reduce the number of prosecutors and increase their salaries."

However, Freedom House cautioned that judicial reform "proceeded slowly in 2016" and cited the concern about the appointment procedure for judges "in terms of candidates' integrity." (Gotisan, 2017). "At the same time, intimidation of judges who do not conform to political orders also posed a problem. The most prominent example was Judge Dominica Manole who faced criminal proceedings after ruling in April that the Central Election Commission's refusal to organize a constitutional referendum as petitioned by 'Dignity and Truth' had been illegal." (Gotisan, 2017). And, while "several law packages and initiatives were adopted, including a law on the prosecution and reforms of the National Anticorruption Center (NAC) and National Integrity Commission (NIC), for most of the reforms their implementation and enforcement are being stalled to preserve political influence over the institutions concerned." (Gotisan, 2017). "While several lower-level laws have been adopted (concerning probation, lawyers, notaries, and so on), high-level reforms have been drawn out or intentionally halted." (Gotisan, 2017).

The stakes are high for the Government of the Republic of Moldova: if the schedule in the Action Plan is not followed and the deadlines not met, then the monetary aid will cease. As one stakeholder said, they are trying to bring about reform by using "carrots, not sticks." (Interview with Judge Groseth). Unfortunately, in 2017 the European Commission said it was "suspending €28m of aid earmarked for judicial reform in Moldova, because the country was not reforming its justice system." ("Poor Moldova," *The Economist*, 2017). "Reform of Moldova's judicial sector has stagnated. Positive steps, like the parliament's first reading of a new law on the prosecutor's office,

or the 2012 establishment of a National Commission of Integrity to deal with conflicts of interest and declaration of assets, have been offset by political interests' blocking legislation and preventing the consolidation of strong institutions and practices. There is a clear unwillingness among the competing political elites to implement necessary reforms." (Freedom House 2016). When reflecting on 25 years of Moldovan independence, one commentator lamented: "The iconic failure of Moldova's transformation is the complete politicization of the judiciary." (Calus).

CONCLUSIONS: THE ECtHR AND JUSTICE SECTOR REFORM IN THE REPUBLIC OF MOLDOVA

Moldova recently observed the 20th anniversary of its accession to the European Convention of Human Rights. While Moldovan courts are constitutionally required to apply the precedents of the ECtHR, when evaluating the effectiveness and the capacity of the ECtHR to serve as an impetus for judicial reform in Moldova over the course of the past two decades, a grim picture emerges.

Given the struggle to combat corruption, the continuing political crises, the turmoil caused by the recent banking scandal, "the country's deep political crisis triggered instability that pushed reforms into the background." (Calus).

The ambitious plans to reform the judiciary appear to have stagnated. Perhaps a "second generation" of reforms can be implemented. One analyst concluded that "Holistic strategy in the first generation justice sector reform did not accomplish their ambitious goals; prioritization of more modest objectives is critical for the success of the second generation [of justice sector reforms]." (Boskovic, 2015).

The Council of Europe, in summarizing the challenges to reform acknowledged Moldova's progress in "bringing its legislation and institutions in line with European standards since it joined the Council of Europe in 1995." (CoE, "Action Plan for the Republic of Moldova 2017-2020). However, the CoE noted that the continued political crisis has been slowing down the implementation of reforms, concluding that "[t]he challenges to complete reforms lie mainly with lack of public trust in the judicial system, lack of transparency and accountability of the political process, wide-spread corruption, inefficient public administration at central and local levels and insufficient institutional capacity in certain areas." (CoE, Action Plan). Nevertheless, the CoE declared that the Council of Europe and Moldovan authorities are determined to work together to "ensure effective implementation of existing legislative frameworks and to enhance capacities of national institutions to bring the country's legislation and practice closer to European standards in order to promote human rights, strengthen rule of law and ensure democratic principles of governance." (CoE, Action Plan). 

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Indexing
Abstracting

HUMANITARIAN AID POLICIES WITHIN THE EUROPEAN UNION EXTERNAL ACTION

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Abstract

The aim of this paper is to analyse the independence, neutrality and impartiality of the EU humanitarian assistance and to which extent is influenced by the EU's political, economic and military goals. The paper focuses on the legislative framework and the interactions between the main actors of EU humanitarian aid and external action, questioning the politicization of EU humanitarian aid. The paper provides a detailed analysis of the structure and organization of the Directorate General for European Civil Protection and Humanitarian Aid Operations and its relations to the Member States, different EU bodies and humanitarian partners, primarily NGOs and UN bodies. The last part of the paper addresses the Comprehensive Approach and how it affects humanitarian aid.

Keywords: EU Humanitarian Aid; DG European Civil Protection and Humanitarian Aid Operations; Politicisation; Foreign Policy; Humanitarian Principles

THE EU HUMANITARIAN AID AS (IN)DEPENDENT INSTRUMENT OF EU'S EXTERNAL POLICIES

The European Union is one of the most important donors of humanitarian aid in the world, and through the promotion of the humanitarian aid principles and the international humanitarian law it is one of the main global actors. This position is particularly apparent through its close cooperation with the United Nations and their Office for the Coordination of Humanitarian Affairs (UNOCHA). The European Union is committed to assist victims of man-made and natural disasters all over the world. Every year more than 120 million people receive EU assistance (Humanitarian Aid 2018). Although the EU and the Member States (MS) altogether are the world's largest donor of humanitarian aid, the EU's global aid amounts to less than 1% of the EU's total annual budget - just over two Euros per EU citizen (Eurobarometer 2017).

Humanitarian aid should be allocated primarily to the most deprived, refraining from discrimination or taking sides in the conflict and should be actualized without political, economic or military interest. Consequently, it is a real challenge to assess the success of EU humanitarian aid as well as its impartiality, neutrality and independence. Success is not easy to measure in humanitarian activities because the success of humanitarian aid is dependent on a variety of variables. On the other hand, failure is easy to detect and often, due to a minor issue, the significance and success of the humanitarian activity is reduced. In order to successfully analyse impartiality, neutrality and independence of humanitarian aid, this paper analyses to what extent these humanitarian aid principles are respected, the competence of the legal framework and the extent to which the Directorate General for European Civil Protection and Humanitarian Aid Operations (ECHO) operates autonomously when making decisions and providing humanitarian assistance.

POLITICISATION OF HUMANITARIAN AID

In order to answer the question whether there is politicization of humanitarian aid in the EU and therefore, if it is influencing the humanitarian aid principles of independence, neutrality and impartiality, the paper attempts to define the notion of the politicization of humanitarian aid. Further on, this chapter analyses in more detail the relationships between other EU external actors and verifies to what extent ECHO is actually independent from other EU's policy instruments.

The politicisation „(...) of European integration can be defined as an increase in polarisation of opinions, interests or values and the extent to which they are publicly advanced towards the process of policy formulation within the European Union." (De Wilde 2007, 20).

Additionally, the politicisation of humanitarian assistance can be defined as „ (...) a notion used to name the use of this assistance for purposes which are in contradiction to humanitarian principles like humanity, neutrality and impartiality, undermining the credibility and increasing the working risks of these organisations." (Reinhardt 2013, 2) Moreover, the definition of "(...) politicisation of humanitarian assistance to the country is indeed the pursuit of domestic and foreign policies of key donor states by 'humanitarian means'." (Atmar 2011, 2). Also it should be noted that the term „ politicization of humanitarian aid has mostly been used to describe situations in which the principles of humanitarian action are compromised at the cost of more political rationales, due to ethical dilemmas faced by humanitarian aid." (Dany 2014, 6). Consequently, we can conclude that the politicization of humanitarian aid occurs when humanitarian aid is used as an instrument of foreign policy in order to achieve internal and external political goals and it results in the violation of international humanitarian law.

It is inevitable that humanitarian aid is affected by the politics, only to what extent? It is intertwined with political institutions and their decision-making process that influence humanitarian aid. In such environment, like the EU, the Member States still have a certain impact, especially those that are the biggest donors. The Commission is a political body, as well as the Parliament, and those bodies at least determine the direction of providing the humanitarian aid. Operationally ECHO is autonomous and independent, but it cannot ignore the political environment surrounding it.

THE LEGAL FRAMEWORK OF EU HUMANITARIAN AID

It was not until 1996 when the European Union, through secondary law, defined humanitarian aid and set out the main goals, principles and procedures for carrying out EU humanitarian aid activities. Council Regulation (EC) No 1257/96 concerning humanitarian aid was adopted on the legal basis of Article 130 of the Treaty establishing the European Community (now Art. 209 TFEU) (EU humanitarian aid instrument 2016). Pursuant to the Regulation, the Community's humanitarian aid shall comprise assistance, relief and protection operations on a non-discriminatory basis to help people in third countries, particularly the most vulnerable among them, and as a priority those in developing countries, victims of natural disasters, man-made crises, such as wars and outbreaks of fighting, or exceptional situations or circumstances comparable to natural or man-made disasters. It shall do so for the time needed to meet the humanitarian requirements resulting from these different situations. Such aid shall also comprise operations to prepare for risks or prevent disasters or comparable exceptional circumstances. (Council Regulation No 1257/96). Although the Regulation has a number of flaws, it has provided a solid legal basis for further improvement of the EU humanitarian aid provisions, that are adopted through the Treaty of Lisbon and, in

particular through the European Consensus on Humanitarian Aid. Due to their implementation, the EU has made significant progress in humanitarian aid legislation and respect for humanitarian principles and goals.

The Treaty of Lisbon

Humanitarian aid was defined for the first time in the EU's primary legislation in the Treaty on the Functioning of the European Union (TFEU), known as the Treaty of Lisbon, which has introduced considerable novelties with the aim to improve the institutional functioning in the area of humanitarian aid.[1] At the beginning of the Convention on the Future of Europe (2002-2003) there was no separate chapter dedicated to humanitarian aid. However, the participants of the Convention realized that it is necessary to define precisely the line between humanitarian aid and the EU's security and foreign policy. Hence, Commissioner Poul Nielson suggested to define humanitarian aid more precisely and to separate the decision-making mechanisms from crisis management and foreign policy procedures (Van Elsuwege, Orbie and Bossuyt 2016, 21). Consequently, the agreed provision on humanitarian aid states:

> The Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union. Such operations shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. The Union's measures and those of the Member States shall complement and reinforce each other (The Treaty on the Functioning of the European Union 2016, Art. 214).

Immediately, in the first paragraph it is defined that humanitarian aid must act in accordance with foreign policy goals, while paragraph 2 of the same article prescribes: „Humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination." (TFEU 2016, Art. 214). These two paragraphs at first seem contradictory and the further interpretation is needed.

The key issue is, how can humanitarian aid operate in accordance with the international humanitarian law and at the same time comply with the foreign policy objectives? All the chapters that define foreign policy instruments contain the same provision, that they shall be conducted within the framework of the principles and

[1] TFEU was signed on 13 December 2007 and entered into force on 1 December 2009

objectives of the external action of the Union. However, the meaning and the purpose of this provision is in fact the harmonization of all foreign policy instruments and not to allow the interference of external or military action within humanitarian aid. That is additionally explained in the Article 3, paragraph 6 TFEU, which notes that: „The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties." (TFEU 2016).

In any case, the fundamental principles of humanitarian law, the principle of independence, neutrality and impartiality must be respected because of the provision provided under Article 214, paragraph 2, which establishes the operational and financial independence of the Directorate General for European Civil Protection and Humanitarian Aid Operations. Harmonization of foreign policy instruments is becoming increasingly important for the European Union, but it does not mean that the principles of humanitarian aid should not be respected. That is also confirmed by the Commissioner Kristalina Georgieva in an interview from 2011:

> In fact, after the entry of the Lisbon Treaty into force, we have a stronger legal ground for the impartiality and neutrality of EU humanitarian action. We have an article in the Lisbon Treaty defining 'humanitarian aid' as a specific policy clearly distinct from foreign and security policy objectives and decision-making, and we have an institutional change that comes with the establishment of my position as Commissioner for Humanitarian Aid and Crisis Response, separate from the External Action Service. My staff is outside the European External Action Service and my decisions on providing humanitarian assistance are driven by only two factors – need and ability to access people in need – nothing else. We are blind to political, religious, or any other considerations (Cooperation, Humanitarian Aid, and Jakob Kellenberger 2011, 10).

It is important to emphasize that also Article 21 of the Treaty, under the Title 5, General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy, stresses in particular humanitarian aid as one of the common policies and actions: "(...) assist populations, countries and regions confronting natural or man-made disasters." (TFEU 2016, Art. 21). Hence, also under this Title humanitarian aid is included as one of the main proclaimed goals in the EU's external action. In fact, the bigger challenge for the impartiality of humanitarian aid can be found in the provision that the EU's and the Member States' humanitarian aid operations shall complement and reinforce each other. The Member States implement humanitarian aid principles considerably less in their actions, as it will be explained later in this paper.

The European Consensus on Humanitarian Aid

The European Consensus on Humanitarian Aid was adopted on 30 January 2008 by the Council and the Member States' representatives. It sets out a strategic framework that directs the EU's and the MS' actions in providing effective, quality and coordinated humanitarian assistance. The goal of humanitarian aid is defined as "(…) to provide needs-based emergency response, to preserve life and to prevent and alleviate human suffering in crisis situations resulting from man-made and natural disasters." (European Consensus on Humanitarian Aid 2008).

While there are only three principles written in the Treaty of Lisbon, the European Consensus on Humanitarian Aid prescribes four fundamental principles and detailed definitions of the terms related to humanitarian assistance. According to the Consensus, humanity means that human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population. Neutrality is defined in a way that humanitarian aid must not favour any side in an armed conflict or a dispute and impartiality means that humanitarian aid must be provided solely on the basis of need, without discrimination between or within affected populations. Finally, independence is defined as the autonomy of humanitarian objectives from political, economic, military or other objectives, its sole purpose being to relieve and prevent suffering of victims of humanitarian crises (European Consensus on Humanitarian Aid 2008).

The European Consensus on Humanitarian Aid also determines how the EU donors should respect the humanitarian principles and good humanitarian practice. This is particularly relevant to the Good Humanitarian Donorship Initiative, an informal international donor forum and network that helps to develop and advance the principled humanitarian action and international humanitarian law. The European Consensus also stipulates that EU humanitarian aid must be coherent with other policies to ensure a smooth transition after the crisis and take into account gender considerations and diverse needs of local people (European Consensus on Humanitarian Aid 2008).

To conclude, the European Consensus on Humanitarian Aid can be assessed as a progressive and remarkable document, important for the humanitarian aid on a global scale. There are not many global actors that regulate humanitarian aid in such great detail and the European Consensus can serve as a model for the entire international community, but as well as for the Member States. In the ECHO's questionnaire, The Union's Humanitarian Aid: Fit for Purpose?, Voluntary Organisations in Cooperation in Emergencies (VOICE) stated that:

> The European Consensus on Humanitarian Aid represents a comparative advantage as it is a comprehensive framework for principled humanitarian action. More binding enforcement of the Consensus would enhance its value, so it should be considered to have a peer review mechanism for Consensus implementation. (VOICE consolidated reply to ECHO questionnaire The Union's Humanitarian Aid: fit for purpose? 2013).

THE INSTITUTIONAL FRAMEWORK OF EU HUMANITARIAN AID

The Directorate General for European Civil Protection and Humanitarian Aid Operations (ECHO)

The Directorate General for European Civil Protection and Humanitarian Aid Operations was established as The European Community Humanitarian Office in 1992 and the old acronym ECHO is still being used, although the office has changed the name and its institutional position many times since then.

ECHO has an annually agreed budget and can freely decide upon any activities up to three million euros. In case of a need to increase the amount of funds for a given activity, "comitology" process follows, in which the funding has to be confirmed by the Member States' representatives in the Humanitarian Aid Committee and the European Parliament (Van Elsuwege et al. 2016, 37). According to the current practice, additional funding was granted each time, which shows ECHO's autonomy and non-interference from the Member States and the European Parliament in the allocation of funds.

It is very important to emphasise that EU humanitarian aid provides support to victims of "forgotten crises", crises where the rest of the world does not provide enough help anymore, and where the EU allocates at least 15% of the initial budget for humanitarian aid. Specifically, in 2016, the EU continued to provide humanitarian aid to Sahrawi refugees in Algeria, internally displaced people in Myanmar and Sudan, conflict-affected populations in Pakistan, and Darfur refugees in Chad (Report from the Commission to the European Parliament and the Council: Annual report on the European Union's humanitarian aid policies and their implementation in 2016).

Humanitarian aid funding is primarily intended for non-EU countries, but in case of exceptional crises or disasters within the EU, it is possible to finance emergency support. For example, as a result of the current refugee crisis in Europe, Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union was adopted to meet the basic needs of people affected by disasters within the EU and to reduce severe economic damage in one or several member States (Funding for humanitarian aid 2017).

The European Commission has an annual budget for humanitarian aid operations around 1 billion Euros and the Commission's assistance reaches over 120 million people every year (Humanitarian Aid 2018). The last conducted evaluation, for the period from 2012 to 2016, shows that „the budget allocations were based on the needs during the evaluation period, however, choices had to be made as DG ECHO's funding was and will always be insufficient to cover the growing humanitarian needs globally." (ICF 2018, 8).

The EU humanitarian aid helps with financing food and nutrition, shelters, health care, water and sanitation and education in emergencies. Additionally, 13% of humanitarian budget is reserved for disaster risk reduction activities in disaster-prone areas to prepare them to face emergencies more efficiently (Humanitarian Aid 2018).

At the very beginning, during the '90s of the last century, ECHO had significant financial challenges. It did not have well-established legal basis and often its actions were the subject of strong criticisms. Today, it is visible that the EU has identified problems and flaws, and by its primary legal framework regulates the independence of the humanitarian aid institutions that are obliged to act on the principles of international humanitarian law and carry out successful humanitarian operations around the world.

The Relationship Between the Directorate General for European Civil Protection and Humanitarian Aid Operations and the European External Action Service

The European External Action Service (EEAS) is the EU's diplomatic service. Its role is to make EU foreign policy coherent and effective and thus strengthen the EU's influence in the world (European External Action Service 2018). The greatest challenge for this relationship is to increase coherence of the EU's humanitarian and external policies. In order for foreign policy to be more successful, cooperation between all external actors and instruments is needed, and at the same time humanitarian assistance must remain independent, neutral and impartial.

ECHO has an office in Directorate D that is in charge of relations within EU institutions and regional offices, and communication and cooperation between ECHO and EEAS. The relationship between ECHO and EEAS is primarily regulated by the 2012 document Working Arrangements between Commission Services and the EEAS in relation to External Relations Issues (Working Arrangements between Commission Services and the European External Action Service (EEAS) in Relation to External Relations Issues 2012). ECHO can decide autonomously about opening or closing its offices, but is obliged to inform the Head of the Delegation about its decision.

In order to achieve a more successful cooperation, EEAS is obliged to notify ECHO of any changes or events that may affect their activities in the area (Working Arrangements between Commission Services and the European External Action Service

in Relation to External Relations Issues 2012). In practice, ECHO humanitarian experts in the field will be careful in their contacts with the EU Delegations, in the sense that they do not want to be closely associated with the EU's political mandate. This also means that ECHO will be selective in its information sharing with the EU Delegations to avoid compromising the humanitarian principles of neutrality and independence (Interview with ECHO official, 6 November 2014 in Van Elsuwege et al. 2016, 40).

The Relationship Between the Directorate General for European Civil Protection and Humanitarian Aid Operations and the Common Security and Defence Policy

The Commission is working closely with EEAS and EU military forces in planning and implementation of the Common Security and Defence Policy (CSDP). The coordination between different stakeholders is regulated by the Council Conclusions on the Integrated Approach to External Conflicts and Crises, approved by the foreign ministers on 22 January 2018. As the number of conflicts and disasters increases, cooperation between military and humanitarian operations is needed. Primarily, there is the need for the protection of experts and volunteers during the implementation of humanitarian activities, due to the increase of attacks on humanitarian staff. On the other hand, it is important that this cooperation is regulated in order to promote and protect the principles of humanitarian aid, avoid rivalry and achieve common goals. A series of documents and instructions were issued to make cooperation more effective and to establish a precise line between ECHO and security forces. In the questionnaire about the EU humanitarian aid Voluntary Organisations in Cooperation in Emergencies (VOICE) stated that existing policy frameworks are clear but often not honoured (VOICE consolidated reply 2018, 10).

The Relationship Between the Directorate General for European Civil Protection and Humanitarian Aid Operations and the Member States

The EU Member States played a significant role in the establishment of ECHO. In order to reduce the role of the European Commission in the EU's external policy, they have advocated to establish a new office that will, independent from the Commission itself, implement humanitarian activities (Van Elsuwege et al. 2016, 18). The interaction between the MS and the EU in the area of humanitarian aid has legal basis in the Article 4, paragraph 4 TFEU:

> In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs (TFEU 2016).

The Member States and ECHO cooperate, exchange and coordinate opinions and strategies on humanitarian activities in a joint working group called the Council Working Party on Humanitarian Aid and Food Aid (COHAFA). The group meets once a month or when it is needed in case of a major sudden crisis. COHAFA is very useful to the Member States in planning and developing humanitarian action strategies, as they receive detailed analysis and opinions from ECHO's experts. However, most of the time the MS send their low-level staff to COHAFA meetings and they should rather send staff with more decision-making power in order to enhance the cooperation (VOICE consolidated reply 2013, 13).

The humanitarian aid of the Member States is more influenced by its foreign policy, but also by day-to-day policies due to the frequent political elections. Although the European Consensus on Humanitarian Aid is generally accepted, there is a significant difference between rhetoric and real practice. Non-governmental organisations have expressed concerns about the MS not respecting the humanitarian law and requested from the Commission to take the lead and stronger position (Voice: The European Consensus on Humanitarian Aid. An NGO Perspective (2012); p. 16 in Van Elsuwege 2016, 39). As the Chief of Cabinet of former Commissioner Georgieva admitted, there are diverse traditions within the Member States, and the Commission does not intend to push them too harshly in a certain direction, playing the role of a "facilitator" and "soft coordinator" instead (EU Governance of Global Emergencies, Conference, Bruxelles (2012) in Van Elsuwege 2016, 39).

In order to respect and promote the principles of humanitarian aid, which is also one of the ECHO's tasks, the Commission should certainly have a stronger impact on the Member States because EU's and MS's humanitarian assistance is, in part, connected and can show a negative picture of the whole EU. The fact is that governments and humanitarian actors in the Member States are more dependent on the political situation and gain of political points, but internal and external policies should not affect the humanitarian aid operations.

The Relationship Between the Directorate General for European Civil Protection and Humanitarian Aid Operations and Humanitarian Partners

ECHO cooperates with more than 200 partners including international organizations such as the Red Cross and Red Crescent, UN agencies, member state agencies and non-governmental organizations. ECHO grants its financial resources mostly to the UN bodies and more information on budget allocations to humanitarian partners are set out in the following table. It is interesting that the surplus of allocated resources to humanitarian organizations may question their independence, neutrality and impartiality. For example, if the humanitarian organization relies solely on the EU's

assistance and does not seek other partners, it will be perceived dependent on the EU's influence. Therefore, the organizations need different sources of funding to be completely independent (List 2018).

Non-governmental humanitarian organizations are one of the most important humanitarian actors. They are not just involved in humanitarian operations, but also influence the creation of humanitarian aid policies. As they are directly "on the ground" and independent from the states and state policies, they can analyse and explore the effectiveness and quality of humanitarian aid better, as well as point to its shortcomings and ways to improve. Most feedback comes from the VOICE, a network that consists of more than 80 humanitarian NGOs located in Brussels (Dany 2014, 4). The organisation's aim is to promote the humanitarian principles and the quality and effectiveness of humanitarian action (VOICE: About Us).

THE EU'S COMPREHENSIVE APPROACH TO EXTERNAL CONFLICT AND CRISES

When the Treaty of Lisbon entered into force new institutional changes were introduced and one of the EU's main goals has been the coherence of the instruments of the Union's external action, "(…) most commonly defined as denoting both the absence of contradictions between different areas of external policy and the establishment of synergies between them." (Orbie at al. 2014, 160). With the Joint Communication to the European Parliament and the Council: the EU's comprehensive approach to external conflict and crises in 2013 the Comprehensive Approach is set out as:

> [A] number of concrete steps that the EU, collectively, is taking towards an increasingly comprehensive approach in its external relations policies and action. More specifically the High Representative and the Commission are - with this Joint Communication – setting out their common understanding of the EU's comprehensive approach to external conflict and crises and fully committing to its joint application in the EU's external policy and action (Joint Communication to the European Parliament and the Council: The EU's comprehensive approach to external conflict and crises; JOIN/2013/030 final, 2).

In order to avoid the possibility of violation of the humanitarian principles, in the beginning of the Communication is stated:

> [H]umanitarian aid shall be provided in accordance with its specific modus operandi, respectful of the principles of humanity, neutrality, impartiality and independence, solely on the basis of the needs of affected populations, in line with the European Consensus on

> Humanitarian Aid (Joint Communication to the European Parliament and the Council: The EU's comprehensive approach to external conflict and crises; JOIN/2013/030 final, 4).

Expert and academic literature recognizes ECHO's position as 'In-But-Out', which can be interpreted as ECHO's participation in the Comprehensive Approach, cooperation with the EEAS and as an instrument of external policy, but it still acts independently, impartially and neutrally on the basis of the need, rather than economic, political or security interests (Van Elsuwege et al. 2016, 46).

The European Commissioner for Humanitarian Aid and Civil Protection during the period 2014-19, Christos Stylianides, commenting on the 'In-But-Out' approach explains:

> EU Humanitarian Actors are 'in' as constructive partners in the analysis of fragility, in the design of programmes to improve resilience and tackling the root causes of instability and poverty, in the dialogue of 'do-no-harm' military action, in use of assets under civilian leadership, etc. But Humanitarian Actors are 'out' when it comes to the pursuit of foreign policy or security objectives as precisely humanitarian actors are there to save lives amidst disasters and conflicts (Stylianides, 2014, 4).

Through the Joint Communication and the Comprehensive Approach the EU can define and promote their interests and values more effectively Joint Communication to the European Parliament and the Council: The EU's comprehensive approach to external conflict and crises 2013, 3). However, it opens up the possibility of violation of the humanitarian aid principles and the independence of ECHO. The future steps will determine how the "In-But-Out" approach actually works and in what extent can the coherent EU foreign policy influence independence, neutrality and impartiality of ECHO's actions. ECHO partially supports the Comprehensive Approach by accepting that better coordination and harmonization between certain external policy instruments is needed, but also stresses that humanitarian aid should not become just another tool in the EU's external action tool box (Van Elsuwege et al. 2016, 46).

CONCLUSION

Humanitarian aid has always been used for achieving foreign policy goals and improving the image of the state, organization or entity *sui generis* such as the European Union. Changes have been made in the past decades in order to make humanitarian aid more independent from the foreign policy interests. A number of non-governmental and international organisations are actively promoting the principles of

humanitarian aid with strong support from EU and UN bodies in charge of humanitarian assistance. ECHO stands out as one of the successful examples of independence, neutrality and impartiality, with its financial independence, free decision-making up to three million Euros and so far non-interference from the Member States and other EU bodies in its professional judgment and decision-making process. Non-governmental organisations which are ECHO's humanitarian partners are very pleased with their collaboration, but to enable them to be more independent, they should be encouraged to cooperate also with other donors.

Through the research, evaluations and the results of the questionnaires significant progress is noticeable in the area of the respect for the humanitarian principles. However, by introducing the Comprehensive Approach the situation will change, and coherence of the EU's external action may lead to infringement of humanitarian principles and politicisation of humanitarian aid. Additionally, it is a real challenge for a day-to-day cooperation with other political, military, security and development actors not to result in subordination of humanitarian aid to other foreign policy goals. It is essential that ECHO remains operationally autonomous as it is so far and that it can carry out humanitarian aid activities only on the basis of need in the affected areas. *De iure* humanitarian principles are included and extraordinarily regulated in *acquis communautaire* and the EU humanitarian legal framework can serve as an example to other countries. Nevertheless, it is necessary to look realistically at the attempt to respect humanitarian principles in practice. Namely, the principle of impartiality is sometimes difficult to apply even when intentions are the best, especially in conflict situations. For example, if ECHO decides to fund a particular organization for which it is objectively aware that it has the best knowledge of the area and how to provide humanitarian assistance, it is still possible for this organization to have hidden intentions and that it is not completely neutral (List 2018). Consequently, in realistic situations, humanitarian principles may seem very ideally set and difficult to achieve in practice. Also, some of the actors in conflict may have the goal to present the EU in a negative light and will argue that the EU is not respecting humanitarian international law, although it may not be the case in a given situation. It should be noted that financial resources are never enough, because the EU as a global actor has to allocate its humanitarian budget to a range of crises. It is encouraging that the last independent evaluation of the Union's humanitarian aid from January 2018 showed that ECHO has allocated the budget on the basis of need and it was not influenced by the foreign policy objectives (ICF 2018, 8). However, further independent monitoring, control and regular evaluation is needed to avoid violating the principles of humanitarian aid. In its work, ECHO should constantly strive to achieve humanity, neutrality, impartiality and independence in the planning and implementation of humanitarian activities. 

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Indexing
Abstracting

THE EUROPEAN UNION AS A REFORMING POWER IN THE WESTERN BALKANS: THE CASE OF ALBANIA

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Abstract

This paper tries to further elaborate one of the most important external powers of the European Union: Its "reforming power" which goes in parallel with its ability as "normative actor" in the Western Balkans. Through Albania as a case study, it tries to argue that the process of Albania's integration to EU has transformed the country in several directions: by introducing a deep juridical reform and by the full alignment of its foreign policy with CFSP and the "regional cooperation". In fact, under the auspices of the EU integration, the country is making all the efforts to deliver on one of the most transformative reforms undertaken in the region, that of the justice system. This gives to EU the features of a "reforming power". The term shows EU as a driving force which makes countries undertake deep reforms they would not have differently realized, if not under the conditionality for the EU integration.

Keywords: Albania; EU integration; enlargement; reforming power; transformative power; regional cooperation; conditionality

INTRODUCTION

It is now more than a decade since the European Union has been called a "normative power" (Manners 2002) a "civilian power" (Bull 1982) a "soft power" (Nye 1990) and recently also a "regime maker" (O'Brennan, Gassie 2009) a "transformative power" (Grabbe, 2006) or a "member state builder" (Keil, Arkan 2016, 4); all terms used in the context of the "Europeanization" and the "democratization" of potential member states. In every case, the common denominator of these terms has to do with the fact that the European Union represents a substantial, peaceful power *vs.* a material, military one and there is where its strength lies.

This terminology has had a significant impact on the countries of the Western Balkans (WB), a region which more than ever needs a common European perspective during these hard times of rising of nationalism, populism and influences of third actors. Even though this might seem true in a first glance, there are many scholars who have often criticized the limited impact of the EU in the Western Balkans by stating, for instance, that the EU: "has limited potential when encountering defective democracies with little chance of becoming EU members (Dimitrova, Pridham 2004) or "lacks a strong normative justification, which affects the degree of compliance with the EU's demands in areas related to state sovereignty" (Noutcheva 2007), or "lacks a plan B in order to prevent countries to be stucked in their way to EU as in the case of FYR of Macedonia, BiH and Kosovo" (Keil, Arkan 2016, 8). Other scholars suggest that the rule-of-law standards in EU accession countries cannot not be met only through "a credible EU accession perspective and an adequate degree of state capacity" (Elbasani 2009), or that the European Union's external democracy promotion via political conditionality might be ineffective in "countries characterized by legacies of ethnic conflict" (Freyburg, Richter 2010). Another interesting point of view comes from Florian Bieber who argues that "conditionality approach has been largely ineffective in regard to state building in part due to the lack of commitment of political elites to EU integration and the persistence of status issue on the policy agenda" (Bieber 2011).

In order to reach its main goal, this paper will try to explore, as well, how the conditionality principle towards the Western Balkans has been shaped in the last years according to the needs of the Enlargement policy of the EU to adapt to its internal and international crisis. It will try to further explore how this transformation has lately affected the WB Region. The Albanian case will be used as a successful example of the EU's "reforming power" and its ability to make substantial changes within the Region of the Western Balkans.

THE SHAPING OF THE EU ENLARGEMENT POLICY TOWARDS THE WESTERN BALKANS

Enlargement has been one of the EU's most crucial questions in terms of its Foreign Policy approach yet has equally suffered from considerable opposition from the start. The phenomenon of the "enlargement fatigue" is not new, it goes back to the France's two vetoes of British accession in the sixties, only that, by that time it was called in another name: that of the "political calculations" (ESI 2016). At the end, both enlargement enthusiasm and enlargement fatigue are only "recurring position in the pendulum swings of the European opinion" (ESI 2016).

The same situation of both enthusiasm and fatigue is reflected in the WB region, as well. From 2003 when the EU Summit in Thessaloniki set integration of the Western Balkans as a priority until now, enlargement has had its ups and downs and the countries of the region are still struggling to fit in the bloc. After Slovenia in 2004, Croatia has been the other member state to join the club in 2013 and it seems to be the last one for a long time to come. The EU perspective dropped in its lowest levels in 2014 when the President of the European Commission, Jean-Claude Juncker, announced a five-year halt on enlargement, a declaration which "echoed pessimism among the WB countries" (Balkan Policy Research Group 2018). This distancing of the membership prospects, coupled with the realization that achieving long-term stability and transforming the region could best be secured through economic growth and increased regional cooperation, produced a controversial trend, leading on the same year to the so-called Berlin process (European Parliament 2016), a German initiative launched by Chancellor Angela Merkel aiming to restore hope for EU integration to the region. Nevertheless, the role of this initiative has often been debated whether it was a substitute for the EU's enlargement agenda or complementary to it. While the former role was clearly the spur in the wake of fading enthusiasm for further expansion, it was suggested that a reinvigorated enlargement effort from the EU part could make the Berlin process facilitate accession of the Western Balkans while enhancing the regional cooperation between them, but things did not seem to go always in the right direction. In fact, the last of its summits in London was expected to open a new chapter and to reiterate the countries' engagement with the WB region, but what happened was that "EU member states 'hijacked' the Berlin Process for their own agenda, while adding little to the process" (Bieber 2018).

As a consequence, a lot of criticism has embraced the Berlin process. There has been a lot of discussion about whether it was best to treat the Western Balkans collectively in this process, in order to avoid cherry-picking future EU members, or to try to generate peer competition to encourage those further behind the reform process to catch up with the leaders. Efforts to foster greater "regional cooperation" would argue for the collective approach. Meanwhile, the European Commission has adopted a more

rigorous approach to preparing the Western Balkans countries for membership in the EU. This approach is based on a benchmarking mechanism for assessing all chapters of the *acquis* (EU law), in particular those on the rule of law and good governance (Apelblat 2018). In parallel, through its main card of SAP (Stabilization Association Process) and the famous principle of "conditionality", the EU has tried to 'impose', even though sometimes not publicly asked, some important policies or activities which have tried to shape the countries in the Western Balkans aiming to split them from the shadows of the past. To achieve this goal, the EC had introduced several changes to the Enlargement approach. In 2015, instead of an annual strategy, the Commission published a multiannual Enlargement Strategy to cover its five-year mandate. As part of its new Reporting Methodology, the Commission placed a stronger emphasis on the state of play and harmonized the assessment scales, making it easier to gauge a country's readiness for EU accession and compare it with other countries over time. The Reports were to include clearer recommendations for priority actions to be carried out within a year, making it easier to track their implementation, known as 'fundamentals first': Rule of law including Judicial Reform, tackling organized crime and corruption, fundamental rights including freedom of expression and fighting discrimination and the functioning of democratic elements including Public Administration, Economic development and strengthening of competitiveness (European Commission 2015). In 2016, the time-frame for publishing the next enlargement package shifted from autumn 2017 to spring 2018, to better align it with the release of the Economic Reform programs and the increased focus on Economic Governance (European Parliament 2017).

The main novelty of this renovated EU approach is that it brought Rule of law to the fore by deciding for Chapters 23 and 24 in the negotiation process to be the first to open. Another high spot was insisting on the regional cooperation as an important factor which will give fresh impetus to the region's economic performance, reconcile its society and prepare it for eventual EU membership (European Parliament 2017). In this context, regional cooperation and good neighbor Relations were once again brought to the fore as an indispensable means of re-energizing common reform priorities and maximizing benefits for the region. The current year, 2018, has certainly seen a renewed focus on EU enlargement in the Balkans created by recent and ongoing events and initiatives such as the State of the Union speech and the first visit of President Juncker in the region, the personal engagement of HRVP Mogherini in the Western Balkans, the February Strategy of the Commission, the April enlargement package, EU-WB Summit in Sofia, the latest Council decision on enlargement, the London Summit and the Bulgarian EU Presidency putting the European perspective of the Western Balkans as a key priority. The main responsibility still relies, nevertheless, on the WB' domestic regimes: they might fail to fully accomplish with the Reforms, as Noutcheva had pointed out a decade ago (Noutcheva 2007).

ALBANIA'S JUDICIAL REFORM PAVES THE WAY TO THE COUNTRY'S 2018 MAIN OBJECTIVE: OPENING OF ACCESSION NEGOTIATIONS WITH EU

Even though diplomatic relations of Albania with EU (European Economic Community at that time) were established in June 1991, it was the Thessaloniki Summit in June 2003 which officially confirmed the EU perspective for all the countries part of the Stabilization and Association Process (SAP). The visit of the former President of European Commission, Romano Prodi, in 31st January 2003 in Albania to open the negotiations for signing the SAP, will stay in the country's public opinion memory for a long time.

From the perspective of the WB countries, the integration process has, for a long time, appeared as a unilateral one, depending mainly on the single country aiming to become part of the EU. This tendency has shifted gradually to a regional one since with the launch of Berlin process in 2014, thus giving more importance to a regional mindset shaping the Foreign Policies of the WB states based on principles of reconciliation, good neighborly relations, political and economic cooperation within the region. The case of Albania is worth mentioning in this direction as a country of the region whose government assessed regional cooperation as one of guiding principles of the Foreign Policy within the Governance Program 2013-2017 (Beshku 2016), while has aligned the governing to the adaptation of its key priorities with the "regional cooperation" and the European Integration in its last Governance Program 2017-2021 (Qeveria e Republikës së Shqipërisë 2017).

From an EU perspective, the EU integration process of the WB, due to frequent internal instability and political crisis of the region since 1990, has often resembled "to the 'raising of a difficult child'" where the "EU has taken the role of a 'European nanny'" (Elbasani 2004). It is important, though, to explore the transformations of both sides in a twofold analysis: The country's Reforms and the shaping of its Foreign Policy from one side and the EU Enlargement policies from the other. It is not the first time that Albania represents a good example in this direction: "Albania-EU relations constitute an excellent case study for analyzing from one side the strategies of transition states in developing their external relations and from the other side the development of the EU's external relations of countries in its regional influence" (Ailish 2001). Meanwhile, the enlargement policy of the EU towards the Western Balkans has changed by becoming more and more demanding and sophisticated than the previous EU enlargement rounds, combining traditional aspects of the Copenhagen criteria and *acquis communautaire* to more specific new ones as those contained in different chapters of SAP, with "rule of law" and "regional cooperation" being the key denominators of the process. The political conditionality of the EU towards the WB countries has changed especially after the 'troubles' faced within the last enlargements and the recent

challenges that have affected the Union such as: migration/refugees crisis, Brexit, foreign and security policy demands (Transatlantic relations, neo Great Power Politics), EU economy (consequence of Euro crises, shifting trade environment, crisis of social state) and the national political transformations (rise of populism, low participation in European elections) (World Economic Forum 2017). A set of precise norms related to state building, the proper functioning of public administration and that of the juridical system towards the Western Balkan countries was developed by introducing "a more muscular conditionality", as Pridham had put it in a nutshell (Pridham 2007).

The case of Albania pays tribute to these incentives. The country has transformed its foreign policy in line with the EU directives and alienates its domestic policy in this framework. In general, these transformations have usually had the support of the political elites and the society, since the Albanian society's positive perception towards the European Union in Albania has been a lot supportive in the last decades. The "European affiliation" has never been put in doubt by its society and the ruling elites (AIIS 2014). No political party or movement, even outside of the traditional ones, has formally articulated any opposition towards the EU integration of Albania in its public speech, but it seems not to be enough still. A proactive approach from all internal parties is needed. The country is still waiting for the opening of the Accession Negotiations and finally a possible date has been set in June 2019, to prove itself "worthy" of this given possibility.

The EU integration process has had its ups and downs, mostly related to internal domestic crisis and policies, but since 1990 when Albania came out of isolation and embraced the liberal democracy system, the European Integration has always been a national objective for the country and still continues to be one of the main axes of Albania's foreign policy (Beshku 2016). It is still considered from all the parties, as the most efficient way of establishing a stable democracy, a competitive market and a modern society, by considering the EU as a "role model" and as a standard measuring mirror.

In this direction, it is particularly true that the Albanian justice system was in need of a radical overhaul because the system suffered from widespread corruption, co-optation, professional shortages, and structural inefficiencies. Public trust in the courts and law enforcement was extremely low, and all of this represented an enormous challenge for rule of law and the Albanian political class seemed to agree on the need to urgently reform the justice sector, if not necessarily on how to go through it (Dobrushi 2017). Albania is not an exception of the cases. The key problems of the Western Balkans have been overall the same in the last decade: deep corruption, weak rule of law, doubtful justice system, fragmentizing parties and authoritarianism, resulting in a pattern of 'democratic decline, both institutional and personal (BIEPAG 2017).

The ways out to these problems remain different and personally tailored for each country, all arriving at the same point: reforms in order to reinforce the "rule of law" with a spillover effect on other fields such as "corruption" and "organized crime". Albania, BiH, Kosovo, FYR of Macedonia, Montenegro and Serbia remain "weak states with dysfunctional institutions, notwithstanding the considerable diversity among them" (BIEPAG 2014). One thing is crucial in the Albanian case: having not been part of the ex-Yugoslavia and its ethnic conflicts, Albania constitutes a country with a "potential of stability" in the whole region. This seems to have been totally comprised also from some EU countries, especially Germany and Austria, the main supporters of the Berlin Process. As Ryan Heath admits: "If anyone can become a surprise front-runner in the membership race it is Albania, already a NATO member, mostly free from the complications of the Yugoslav wars of the 1990s, with no bilateral disputes and a stability factor in the region" (Heath 2017). Furthermore, the fact that the country has undertaken a unique deep reform in the justice sector since 2016 with no predecessors in this direction, may fulfill the bases for the EU to be baptized with the term of a "reforming power".

Four years after being granted candidate status in 2014, the country has tried to demonstrate progress in the implementation of the five key priorities for the opening of accession negotiations, as confirmed by the last Reports of the European Commission. Referring to the 2015 Report on Albania, the country was "a constructive partner in the region, further developing solid bilateral relations with other countries preparing to join the EU and neighboring EU Member States" (European Commission 2015). Albania has continued to participate actively in the regional cooperation approach and continued to maintain good neighborly relations in line with its commitments under the Stabilization and Association Agreement (European Commission 2015). Although the EU praised Albania's commitment and steady progress on them, it made it clear that the next step – opening negotiations – will depend primarily on completing the ongoing judicial reform and ensuring constructive cross-party political dialogue. "The judicial reform constitutes the toughest nut to crack. The rule of law is the cornerstone of the entire process" (Steinmeier 2014). Thus, the European Commission is supporting Albania in conducting a thorough and credible vetting process through the International Monitoring Operation (EEAS 2016).

The thorough and complex justice reform was launched with a set of amendments that changed to one third of the country's Constitution. The main features of the ongoing reform can be summarized around the following pillars: measures to fight corruption, including by establishing a new Special Anti-Corruption and Organized Crime Structure (SPAK); measures to reduce the influence by the parliament and the executive on the judiciary; measures to increase the independence and effectiveness of the High Court, as well as the independence, impartiality and transparency of the

Constitutional Court and the High Council of Justice and Prosecution system; measures to increase accountability of judges and prosecutors, including by setting up the new High Judicial Council, the new High Prosecutorial Council, as well as a High Justice Inspector; measures to increase justice efficiency and access to justice (European Commission 2018).

In addition to the institutional restructuring of the judiciary, the reform process foresaw the launch of a generalized re-evaluation (vetting) of all judges and prosecutors. This entails that around 800 professionals (judges) are currently undergoing scrutiny through the so called "the vetting process". The vetting has already started. The Albanian vetting institutions have completed the assessment of the top priority cases (European Commission 2018). As a *sui generis* process, "the reform could be used as a role model by other countries in the region, not least because it considers stability concerns" (Bushati 2016). Nevertheless, the process has been stopped due to a political crises started on February 2017: the opposition party (Democratic Party) decided to boycott all parliamentary activities which started some months ahead the general parliamentary elections, supposed to be held on June 2017. There were the first signals that the reform was encountering a strong political resistance within the Albanian political environment.

The crises seemed to finally come to an end in May 2017. The EU appraised the agreement reached by the two main political parties (Socialist party in power and Democratic party in opposition) by postponing the elections on 25 June 2017. After the elections, the Socialist Party (PS) took the power with an outright majority and the ability to form a single-party government. External factors such as the EU and the United States also exerted significant positive influence on Albania's politics (Fras 2017).

Although the vetting of the prosecutors still goes on, some of the main constituent bodies of the Justice System have not yet been put up, even after two years after the process has started. One thing, however, seems clear: "No matter how long it takes, or who is ultimately in control-all roads seem to lead in Brussels" (Dobrushi 2017). As it we tried to argue in the above analysis, the justice system's reform of Albania does not constitute a point of arrival of the country's advance towards the integration in the EU, but rather a point of departure, as a consequence of being the "rule of law" the cornerstone of the EU integration of the country. If duly and fully implemented, the successful ongoing of this Reform should lead to the opening of accession negotiations in 2019 of Albania with the European Union.

CONCLUSION: A "REFORMING POWER" EU

After the decline of Soviet influence and the shortage of regime alternatives, the EU was the only hegemonic "civic" or "normative" power without competitors in the former communist space. However, the power of the European Union in the Balkans is linked to the credibility of the EU integration process (Abazi 2018). The integration process is strongly linked to the EU enlargement policies that present a fascinating policy field in which to explore the emergence of (new) modes of governance. Entrenched in the path-dependent evolution of EU external relations and enlargement, it exhibits all four modes of governance: hierarchy, negotiation, competition and cooperation. EU conditionality over membership in the club in combination with economic, legal, and financial linkages comes to be a mean for democratization, Europeanization and good governance in the region. Therefore, the integration and enlargement process should be in line with each other and with the development of the WB countries. EU's patronizing role in guiding domestic political reform and economic transition, with the promise of future membership, is crucial for the future of the region. The way forward to the EU of the Western Balkans is based on the "conditionality" test of enlargement through reform driven approach from countries while relying on the golden carrot of membership. This is where EU bases its 'supremacy' as a necessary "reforming power" in the region. Under these conditions, it is true that the EU, often confronted with political pressures coming from national political forces in the WB countries in order to maintain the *status quo*, has become not only the "driving force" (Keil, Arkan 2016, 4) for their democratization, but also a crucial actor for important internal reforms. The question is: for how long will things uphold?

The recent developments within and outside EU "have created a 'power vacuum' in the Western Balkans" (Abazi 2018), which third actors are attempting to use in their interests. In turn, Western Balkan leaders may be attempted to sometimes see the current geopolitical challenges "as an opportunity, not a problem" (Abazi 2018). However, in a changing international order, the EU must consider moving towards a deeper mode of integration and develop mechanisms to anticipate and alleviate any negative consequences of geopolitical developments. Keeping Western Balkan countries tied to a real EU involvement and perspective is a precondition for their not turning the back on Europe and meddling with third actors or authoritarian powers that do not uphold European values. Both sides need not fall for the prisoner's dilemma, the notorious paradox in game theory in which two parties act out of individual self-interest and both lose out in the process (Abazi 2018). In this status of things, "formally opening the negotiations does not necessarily mean a swift or inevitable conclusion, but the EU needs to keep hopes alive among candidate nations if it wishes to retain its influence" (Kouchner 2017).

In the case of Albania, EU is highly perceived as the only way forward since the early nineties. The EU acts as a perfect "normative" or "soft power" able to generate consensus from all the political internal actors in the country, even though the reforms demanded by the EU are sometimes painful but necessary as the case of the still ongoing juridical reform in Albania has shown. In any case, the fact that the country has undertaken such a deep justice reform under the auspices of the EU may make the Albanian case as an "instructive" (Kouchner 2017) one and EU in its regard as an excellent "reforming power". Thus, as we have tried to argue, Albania constitutes a good example of a *reformateur* under EU's oversight comprising three areas: foreign policy (full alignment with CFSP), regional relations (good neighborly relations following Berlin Process series) and the domestic policy (reform of the justice system) as the rule of law is a crucial prerequisite for a healthy society, the consolidation of democracy and the economic development of a country on its way to the EU.

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Indexing
Abstracting

CLAUSES OF CORPORATE SOCIAL RESPONSIBILITY IN THE INDONESIA NATIONAL LAW IN THE PERSPECTIVE OF INTERNATIONAL INVESTMENT AGREEMENT

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Abstract

This paper elaborated clauses of corporate social responsibility as government policy and its implication to the international investment agreement. It is also explore the main sets of ideas and the theoretical framework that form the basis of CSR as introduced in article 15 of Investment Law. The analysis exposes the role of social responsibility and environment management as an obligation in protecting the interest of the states; investors; peoples and comparing it with the Prohibition of Performance Requirement (PPR) as mostly introduced in international investment agreement, particularly in investment chapter under FTA.

Keywords: investment; agreement; CSR

INTRODUCTION

Clauses of Corporate Social Responsibility (CSR) as introduced in Investment Law has many implication to the International Investment Agreement, legal framework of international agreement involved entire government policy on investment. International investment agreement consist of bilateral, multilateral and International Investment Agreement IIAs. Legal basis of bilateral and multilateral investment agreement was very different since each has different purpose agreement. Bilateral agreement namely BITs, Bilateral Investment Treaty signed by government of Indonesia with more than 86 countries in the world; the objective of BITs made by two countries is to protect the interest of investors from the two states, while multilateral investment agreement mostly fall under the FTA (Free Trade Area) agreement and International Investment Agreement in principles define as agreement involving more than two states. Article 15 of the Investment Law requires foreign and domestic investors to engage in social responsibility, noncompliance with article 15 can lead to administrative sanctions. Debate among scholars commencing from definition of CSR, Carol and Buchholtz (2000, 35), offer definition of CSR, that encompasses the economic, legal, ethical and philanthropy expectations placed on organizations by society at given point in time (Hennigfeld et. al. 2006, 6). The CSR also relatively known as social phenomenon along with development of social interaction particularly among industrialist and business communities. The moral issues arising from industry and business activity has occupied of philosophers, scholar, writers, religious leaders and law makers for centuries (Zerk 2006, 15).

Recently, CSR (Corporate Social Responsibility) became an important topics issue. The discourses of CSR broadly discussed among the scholar, industrialist, economist, lawyers and others interested parties. The core of the debate has focused primarily on questions around and considered to be appropriate of the right or responsibilities of the government, businesses, peoples and stakeholder at large. The common theme implicitly in defining CSR is integration means that integration of economic, social, legal and philanthropy. As an independent and sovereign state, government has an obligation to protect the right of the nation and its peoples in various aspect of life. The availability of goods and services is essential for the benefit of the peoples at large, hence in maintaining those availabilities State is oblige to undertaking any policy and action to perpetuate the country's economic activities and sustainable development. This is a consequences of the implementation of article 33 (4) State Constitution 1945 "The National Economic is based economic democracy with the principles of togetherness, efficiency with justice, sustainability, environmental friendliness, independence and a balance economic progress and national unity" furthermore article 34 "(1) The poor and neglected children are maintained by state, (2)

The state develops social networking system for all citizens and to empower the weak incapable in accordance with human dignity, (3) The state is responsible for the provision of health care facilities and public service they are deserve, (4) further provisions concerning the implementation of this article shall be within the law" (Sriro 2010, Soule 2009). In the Indonesia positive laws, the State Constitution is the highest sources of laws. Hierarchy, the order of Indonesia positive laws:

1. The 1945 Constitution (Undang-Undang Dasar 1945);
2. Statutes (Undang-Undang)/Interim Emergency Laws (PERPU);
3. Government Regulations (Peraturan Pemerintah);
4. Presidential Regulations (Peraturan Presiden);
5. Regional Regulations (Peraturan Daerah).

Law must not conflict with any law higher than any own type in the hierarchy and law can amend or revoke any law that is lower than that is type in the hierarchy. The legal basis of Indonesia CSR stemmed from Investment Law (Law No. 25 of 2007), Limited Liability Law (Law No. 40 of 2007) and State Own Enterprises Law (Law No. 19 of 2003) complemented by Government Regulations, Presidential Regulations, Regional Regulations and Minister Decree.

There is strong contemporary interest in exploring the relationship between corporate social responsibility and environmental responsibility. Overlapping in implementing regulation sometime is inevitable. For example in the extent of ownership of the company, the companies such as Garuda Indonesia and PT Telkom, in nature they are public companies, most of the share posed by the government as a consequences those companies also fall under State Own Enterprises Law. In normative context there will be conflicting of interest, on one hand provision of CSR in the Limited Liability Company Law is limited to the company which performs in the field of natural resources and there is no obligation to undertake the CSR to others company on the other hand, the provision of CSR as states in the State Own Enterprises Law and follows by Minister Decree and Minister Regulation is clear and involving standard operational procedure, there will be no doubt to undertake corporate social responsibility.

Having establishment of the background of this article, the section of the article divided such as follows:

Section I. Examines the historical background and nature of the legal basis of CSR in Indonesia.

Section II. Introducing the Nature of CSR in the perspective of legal framework.

Section III. Legal framework of CSR in the perspective of Indonesian National Law applies the legal framework to the development of CSR in Indonesia and the interactive process associated with the legal construction, government policy and explores the

main sets of ideas and the theoretical framework. The last section of the article draws the conclusion and recommendation.

HISTORICAL BACKGROUND OF THE LEGAL FRAMEWORK OF CSR

Since Indonesia entering the reform era (1998), House of Representative often proposed CSR as a compulsory item in the several laws and regulations which is related to economic, social and environment, as a result law and regulation of CSR exist in three laws, Investment Law (Law No. 25 of 2007) Law Limited Liability Company (Law No. 40 of 2007) and State Own Enterprises Law (Law No. 19 of 2003).

CSR in Investment Law

Prior 2007, Investment law in Indonesia consists of two laws that is Domestic Investment Law (Law No. of 1967) and Foreign Investment Law (Law No. of 1968), in 2007 Parliament and Government agreed to renewed Investment Law and become Investment Law (Law No. 25 of 2007). Foreign Invested Enterprises and Domestic Invested Enterprises are company which granted fiscal privileges such as import duty facility and proposal for Income Tax facility and non-fiscal privileges such as Number of Importers Produced, planning for using foreign workers and working visa from the government. The purposed of improvement is to attract foreign and domestic investors such as mentions in article 3 (2) states the need for investment to increase economic growth, employment, sustainable economic development, national competitiveness, technological capacity and public welfare.

The equal treatment to domestic and foreign investors is assurance, the rights granted to the investor states in the article 14 (a) Every investor is entitled to obtain certainty of rights, law and protection (b) open information concerning business sectors within which they are engage (c) right to services and (d) various of facilities in accordance with provisions of regulations of law. Instead of preferences that granted to investors also require to perform of obligations as states in the article 15 Every capital investor is required to "Adhere to principles of good corporate governance" Art 15(a), implement corporate social responsibility Art 15(b),make reports concerning capital investment activities and deliver them to Capital Investment Coordinating Board Art 15(c), respect cultural traditions of society in locality of capital investment business activities and Art 15(d), fulfill all provisions of regulations of law Art 15(e).

The law related to CSR as mentions in the article 15 (b) implement corporate social responsibility, non-compliance is lead to administrative sanctions, which include warnings or even the limitation, freezing or cancelling of investment activities as states in article 34 (1) these sanctions will be imposed by the institution with authority as

declared in Law article 34 (2). In a common sense CSR is encompasses of economic responsibility, legal responsibility, ethical responsibility and philanthropy responsibility, the implementation of responsibility is on voluntary basis. One among the reason of requirement to fulfill CSR to foreign investor and domestic investor followed by administrative sanction to the non-compliance is to perpetuate socials life of the peoples and their environment from investment activities. Other reason is in certain conditions voluntary CSR is cannot suitable to the need and concern of other parties.

Moreover new Investment Law also allow foreign investors to obtain and hold land for longer than previously permitted, since then interaction with the native surround more intent and as a consequences environment responsibility should be taken into account and the burden emerged from those interactions become responsibility of investors and the peoples surround. The scope of stakeholders' role not only covers the social environment responsibility surround because the social life sometime impacted wider than the expectation.

CSR in Law Limited Liability Company (Law No. 40 of 2007)

In order to enhance the national economic development and providing a solid platform for business community in facing the developments of the international economic and also the science and technology, the government needed to renew the Law of Limited Liability Company. Definition of Limited Liability as referred in article 1(1) (Law No. 40 of 2007), states "In this Law a Limited Liability Company (hereinafter called a "Company") means a legal entity constitutes an alliance of capital, established in pursuant to a contract in order to carry business activities with an authorized capital which is divided into shares and which fulfills the requirement stipulated in this Act and its implementing regulations". Moreover corporation as the agents of economic welfare and function as limited liability companies are required to provide added values in the form of both financial returns for the shareholders and the benefit for the peoples and environmental preservations. The law related to CSR Corporate Environmental and Social Responsibility in Indonesia as states in article 74 of Law Number 40 2007 on Limited Liability Company establishes that's:

1. Companies doing business in the field of and/or in relation to natural resources must put into practice Environmental and Social Responsibility.
2. The Environmental and Social Responsibility contemplated in paragraph (1) constitutes an obligation of the Company which shall be budgeted for and calculated as a cost of the Company performance of which shall be with due attention to decency and fairness.

3. Company who do not put their obligation into practice as contemplated in paragraph (1) shall be liable to sanctions in accordance with the provisions of legislative Regulation.
4. Further provisions regarding Environmental and Social Responsibility shall stipulated by Government Regulation. In respect to the implementation of article 74 p 1, 2, Limited Liability Companies Act No. 40 of 2007, state that "A corporation in performing its obligations shall be completely comply in accordance with the purposes and objectives of social and environmental responsibility." Article (1), Environmental and Social Responsibility means "A Company's commitment to take part in sustainable economic development in order to improve the quality of life and environment, which would be benefit for the company itself, the local community and society in general."

CSR in State Own Enterprises Law (Law No. 19 of 2003)

As implementation of the State Constitutions 1945, several rules and regulations regarding the CSR have been issued, for instance in Law Number 19/2003 regarding the establishment of the SOEs accordingly in article 2, "the SOEs must be active on exercising and delivering aid directed to small medium enterprise, cooperative and peoples. The aim of exercising and delivering financial aids is to improve social life of the peoples in general sense and to boost the capacity and capability of the small medium enterprises and cooperative in conducting their activities on their respective business field.

How the State Own Enterprises implement their CSR? Minister of the State Owned Enterprises of the Republic of Indonesia, issued the Minister Decree (Keputusan Menteri) Number Kep 236/MBU/2003, on that decree it is states "State Own Enterprises are oblige to carry out the partnerships and environment coaching, the Indonesian those program is PKBL (Pembinaan Kemitraan dan Bina Lingkungan)". Partnership development program is defined as improvement program for increasing the capability of Small Medium Enterprises in order to stronger and self-sufficient. Environmental Development Program defined as Empowerment program of the socials of the peoples through the profit of State Own Enterprises. Instead Minister Decree No 236/MBU/2003 through Minister Decree No. Per-05/2007 (Permen No. Per-05/2007), aim of the Minister Decree of 2007 to emphasizes State Own enterprises in performing their obligation, social duty awareness, accountability and corporate actions. The pin points of policy principal that can be concluded are as follow:

1. Profit allocation maximum 2% for the Partnership Development Program and Environmental Development Program,
2. Services Budget 6 % or subject to change,

3. Operational Cost : 100% administration. Loan and others revenue,
4. Business to Business synergy,
5. Environmental Development Program 30% for State Own Enterprises Environment Care and
6. Environmental Development aid Program for natures conservation.

Partnership development means that's every State Own Enterprises oblige to develop the partnerships particularly partnerships with Small Medium Enterprises, no matters the business field of each others are same or different aids given to the Small Medium Enterprises is purely in the spirit of charity and philanthropy. With no heed to the business field of each parties indicating the nexus between two enterprises merely as an ordinary business relation there are no overlapping in the ownerships at all. The objective of the partnership development will helping Small Medium Enterprises the capacity and capability of Small Medium Enterprises at large through capital aid, improving (management, marketing, producing skill) and etc. Partnership and Community Development Program (Program Kemitraan dan Bina Lingkungan - PKBL) as in which the costs incurred must be taken from the net profit of the company.

The implementation of the Ministry decree above were to emphasis the social responsibility obligation of the SOEs. In addition to the emphasizing of the obligation of the SOEs duty, the content of the decree also contain the standard of procedure of implementation of the social partnerships in order to coaching and delivering the financial aids program. Financial aspect was played major role on the implementation of the CSR in the scope of SOEs. The sources of the CSR fund should be taken from the net profit of company's last year activities it is mandatory as stated on the Decreed of Minister of Small Medium Enterprises. It means that the funds must be taken after the net profit and not before profit, it is contrary to Law Limited Liability, the implementation of the social environmental responsibility is submitted to the respective company which is also inclusive enacted of codes of conduct of the company because the share of State Own Enterprises not only pose by the government. The historical background of the Law Number 19 1960 of State Own Enterprises Law put the five different types of State Enterprises under one single regulation in order to facilitate the administration of state enterprises. The objective of the formation of state enterprises is varied. The state own company under the one statute article 1 of Law No. 19 1960 states "the state enterprises is any enterprise the capital of which is State property of belongs to the State's Treasury, except when otherwise state by the law" the capital is, an amount separated from the State's Treasury, not divided in share. State Own Enterprises is established by the Government Regulation.

INTRODUCING THE NATURE OF CSR IN THE PERSPECTIVE OF LEGAL FRAMEWORK OF CSR

Sharing benefit of exploiting natural resources is becoming one of the strategic methods to accelerate the creation of public welfare. Commonly, the exploitation of natural resources involves many corporations, particularly multinational corporations (MNC) and leading company. Numerous concessions were granted to foreign investors in order to boost the capital inflow and transfer technology. The concessions also incorporated in many sector such as natural resources, plantation and transportation. In some countries contact between multinational and their home states were not always friendly, home states are aware of the potential threats of multinationals regarding the local economy, employment and safety policies. The establishment of foreign investors company results in a win-win profit for the shareholder (owners of the company) and home state. Exploration of natural resources sometime emerge of air pollution, water pollution or both and huge land hole and etc. Most of peoples particularly in the develop countries accept that the greenhouse gas emission (GHG) release into the atmosphere is still growing and emerging unpredictable changes to normal climate pattern, having regard to the environmental damage, all of stakeholders have to play a major role in global effort to put a brake on further climate changes. Carbon footprint it's the effective measurement, means that the quantification of how much damage to the environment by way of GHG emissions. The carbon footprints measurement is the amount of greenhouse gases in units of carbon dioxides, produced by human activities. In condition of river running dry, dropping lake and groundwater levels and species endangered because of contaminated water that indicating of water pollution. Alongside with the carbon footprints the water footprint helps to show the link that our daily consumption of goods and the problems of water depletion and pollution exist. There are three component of water footprint (Hoekstra 2009):

1. The green water footprint refers to consumption of green water resources (rainwaters storage in the soils as moisture),
2. The blue water footprint refers to consumption of blue water resources (surface and ground water) and
3. The grey water footprint refers to pollution and is defined as the volume of fresh water that is required to assimilate the pollutant load based on existing ambient water quality standards.

Many of company heavy consumers of water such as several mineral water producers (Aqua, Adest and local brand company), has conducted many water assessment. In the extent of government roles recently considering as government concern only, requirement to perform corporate social responsibility to company is

considered as devolution of social and environmental responsibility from the government to the companies. The notion of CSR is vary and specific a modern need and issues that not easy to pinned down precisely (Kerr et. al. 2009, 5), numerous of international organization incorporate legal values and scopes of CSR norm while producing standard. Without standard legal definition, implementation of CSR tend to avail code of conducts of the company, since then many companies in developing their own strategic and policy involved social responsibility issues. It is not easy indeed to balance the interest between the shareholder of the company and the stakeholder, interest of shareholder whichever comes first in order to return their investment as fast as possible, on the other way around home state in this regard considered as stakeholders has an obligation to preserve the interest of socials life of the peoples. In term of social responsibility activities of the company complication will emerge when the issues between pursuit of the profit on one hand and obligation to undertake social responsibility on the other hand. Corporate social responsibility that so-called CSR-as what Doreen McBarnet (McBarnet et al. 2009, 12) has written this:

> CSR essentially involves a shift in the focus of corporate responsibility from profit maximization for shareholders within the obligation of law to responsibility to a broader range of stakeholders, including communal issues such as protection of environment, and accountability on ethical as well as legal obligations. It is shift from bottom line to triple bottom line, as it sometimes put, from profits to people, planet and profit indeed to profit principle to cite Shell International's social report.

In the absent of rule of law in the extent of implementation of social responsibility seven principles of New Delhi Declaration could be introduced as a basic law principles of social responsibility. The seven principles of New Delhi Declaration such as follow (UNISDR 2016):

1. Integrated, Sustainable Decision Making,
2. Stakeholder Engagement,
3. Transparency,
4. Consistent Best Practices,
5. Precautionary Principle,
6. Accountability and
7. Communities Investment.

LEGAL FRAME WORK OF CSR IN THE PERSPECTIVE OF INDONESIAN NATIONAL LAW

An attempt was made to put the obligation of CSR in the three legal bases that is Law of Investment (Law No. 25 of 2007) Law of Limited Liability (Law No. 40 of 2007) and Law of State Enterprises (Law No. 19 of 2003). The Foreign/Domestic Invested Enterprises which performing their business in the field of exploration of natural resources always granted privilege from the State. The nexus between investor and State should be in the contractual basis (Kerr et. al. 2009), concession granted by the State not only to the investment companies, others company also entitle to get concession from the State. The theory of classical international law principles is priority gives to the home state to regulate of multinationals companies (Zerk 2006, 57), mean that every state has right to regulate MNC (multinational company) activities within their jurisdiction. The legal context of CSR in Indonesia constitute of mandatory aspect and voluntary aspect. Obligation to fulfill social responsibility followed by administrative sanction to non – compliance is sole power of provisions. The flexibility approach given by the Law in condition lack of further provision such as what mentions in the article 74 p 4 (Law No. 40 of 2007), provision regarding implementation of CSR is submitted to the respective company if there are no further provision follows, means that's company allowed to avail their own codes of conduct as a standard of procedure in performing social responsibility as long as the content of the code not against the law in this regard credibility of codes of conduct will reflecting performance of social responsibility of the company. Furthermore the international standard report of CSR performance of the company such as Global Reporting Initiative Generation 3 (Global Reporting Initiative 2011) and ISO 26000 are international standard that accommodated by most of the company in the world (Lambooy 2010, 261). Hence, in order to measure the CSR performance of the company particularly MNC whether GRI or ISO 26000 could be used as standard report.

In assessing the enforcement of rule and regulation certain criteria such as follows (Lo Fuller, the morality of Law 1964); law should be general, they should be promulgated, retroactive, understandable, not contradictory, not require beyond the ability, they should remain relatively constant, they should be a congruence between the laws as announced and their actual administration (Feinberg et al. 2004, 14), those criteria's should be taken into account. In respect to the Investment Law, with accordance to the provision of CSR to both foreign and domestic investors, enforcement of the law will implied by asking a question what is the measurement of corporate social responsibility activities, does the performance indicators of social responsibility of the investors will be accepted in compliance to the law, there's should be certain acceptable legal standard and norm in order to measure the performance of

social responsibility of the investors activities, voluntary approach such as company code of conduct existing can be avail as legal standard and norms. Having regard to perspective of relationships CSR with the law and public policy has been difficult to pin down whether prescriptively or descriptively (Ward and Smith, 2006, 14).

In respect to the administrative sanction to the non-compliance such as mentions in the Investment Law and Law Limited Liability Company provision to fulfill of CSR is an absolute obligation. In absence of further provisions the company tend to do things easy, charity and philanthropy would be considered as social responsibilities, such as supporting social activities of the peoples surround the business location by giving certain amount of money and many other things therefore their activities would be considered as intention to avoid administrative sanction than social responsibilities at large.

Provision of CSR, such as mentions in State Own Enterprises Law is follows by Minister Decree and Minister Regulation. The procedure of implementation is very clear, unfortunately those provision only address to State Own Enterprises not to the private company. Basic requirements in performing CSR is financial performance of enterprises, that's financial past performance (previous year) should be in the positive balances position, means that State Own Enterprises in negative balance shouldn't performs CSR until they reach positive balance again. In the best practices those provision impacted the continuities of the program and emerging a question whether the enforcement will reflect the best practices or rather intend to stimulate to develop such best practices (Lambooy 2010, 261).

For the seeks of the MNC (multinationals corporation) company that fall under Investment Law, there is no further provision to undertake CSR besides of what was states in the Law. As transnational company, MNC should be fall also under International Law and as a consequences they will avail the International Treaties and International Agreement that is constitute of International Declaration as a results of International Summit in (Rio Brazil, Johannesburg South Africa and New Delhi India),as the basic principles in order to comply the regulation. In the meantime consensus in extent of CSR has been developed, the range of the consensus encompassing environmental and social issues that are applicable corporation generally, regardless of their size, sector and geographical location (Hennigfeld et. al. 2006).

In respect to Limited Liability Company Law, demand to fulfill environmental social responsibility limited to the company which performs in the field of natural resources but not to the company whose performs others activities hence in this regard the question will implied, in the extent of CSR obligation does the Limited Liability Company Law part of Investment Law. The conflicting norm between two provision will emerge uncertainty because demand to fulfill CSR as mentions in the Investment Law be understood as general provision to all kind of Foreign/Domestic Invested Enterprises,

in the other way round Limited Liability Company Law, limit to company which perform in the field of natural resources only. For the seeks, if there is no obligation to undertake of environmental social responsibility such as to the Limited Liabilities Company then will be rising question again does the company have a social responsibility. In regard to positioning approach, the companies can be seen as closed system functioning independently for the benefit of its owners or to the contrary as part of triangle of market, state and civil society (Hamers et al. 2005, 6). As part of the civil society, performance of the Company become strategic issue, output of the company as a result of business activities, commonly resulting of the outcomes of business in society which is including outcome in terms of business impact. Outcome of the company is an element of performance indicators at large since then regardless whether there is an obligation to undertake the CSR or not, performance of company would be measured from their social outcomes.

CONCLUSION

Although legal basic of CSR in Indonesia is promulgated, but regulation to undertake the social responsibility as mentions in the three Laws such as Investment Law, Limited Liability Company Law and State Own Enterprises Law, rather to addresses to the specific company which is related to the type of the company. From the three legal basis mention above, only State Own Enterprises Law followed by the regulation regarding the implementation of undertaking corporate social responsibility. In terms of enforcement the double standard of measurement emerged from the overlapping of the provisions. Moreover in case of limited liability companies, if they are whether not performs in the field of natural resources and not registered as Foreign/Domestic Invested Enterprises, by the law there will be no obligation to undertaking corporate social responsibility at all.

The performance of social responsibility of the company is very importance, in respect to Minister State Own Enterprises Decree regarding the implementation of Corporate Social Responsibility; the company which allows performing of CSR is subject to the past performance of the State Own enterprises. The past performance of the company means is identified from the financial balances, for the State Own Enterprises whose indicate negative balance in the last years means those Enterprises not oblige to carry out the CSR. As a consequence if they are absence in performing of social responsibility, the performance of CSR of the company is impacted finally influence the performance of the company as a whole.

In line with the Law of Limited Liability Company as states in Article 74 p 4 the implementation of Environmental Responsibility is submitted to the respective company, the roles of the (OECD Guideline for Multinational Enterprises, the ten principles of

United Nation Global Compact, the ISO 26000 Guidance and Standard on Social Responsibility, the ILO Tri-Partite Declaration Principles Concerning Multinational Enterprises and Social Policy, and the United Nation Guiding Principles on Business and Human Rights), in implementing of CSR in Indonesia is very strategic and dominant because most of the MNC and leading company avail the basic principal above. 

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Indexing
Abstracting

RECOGNITION OF NEW STATES: KOSOVO CASE

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Abstract

The recognition of Kosovo is an issue in some part of the international community even though its independence has been recognized by 116 states and that the ICJ has given a legal opinion which confirmed that the independence was not a violation of international law. This paper analysis the pros and cons and the difficulties created by the non-recognition of Kosovo both for the region and broader, dealing not only with the political reasons and difficulties. The paper is written by using combined methodology and methods: systemic analysis, of legal analysis, and method of comparison analysis. Conclusions and recommendations are expected to be a contribution towards a further debate about the importance of the recognition of the state of Kosovo.

Keywords: independence, declaration, Kosovo, state, international community

INTRODUCTION

The term state was heard in the history as new states were created, and in the meantime others disappeared. Some were occupied for a short or a long period of time. Others were colonized and then decolonization appeared (Rrahmani 2015). The international community deals with the issue when the state appears factually. It is not important in which way the state was created: whether it was created in accordance with the exiting internal or international order (Gruda 2007, 71-72). When a state appears factually, then it is considered that there is a starting point for a judicial fettle. Related to how the state is defined there are many theories and thoughts whereas "the state is a type of legal person recognized by international community." (Brownlie 2003, 69).

The Kosovo Declaration of independence was adopted by the Kosovo Parliament on February 17, 2018. Thus the international recognition of Kosovo is a request since its independence, and also an objective of the Kosovo state structures. The recognition went through some waves. The first wave was realized very quickly. Essentially, this one was the most important, because Kosovo was recognized by the most important Western states such as the USA, the United Kingdom, France, Germany, Italy, etc. Then the process faced obstacles and some stagnation which made the process slow down. The recognition of a state has a political and economic importance and the effects of the recognition are quite crucial.

Since the open request for recognizing Kosovo, Kosovo addressed by Kosovo regarding the recognition, the states could be divided in the following groups: states that reacted immediately and recognized Kosovo; states that hesitated at first then changed their attitude and states that are declared to be against the recognition of Kosovo (Rrahmani 2015).

DEFINITIONS OF RECOGNITION

It is clear that the problem of recognition of states and governments has not ensured satisfaction in theory and in practice. Many efforts were made in order to adopt the constitutive theory. Lauterpacht maintained, for example, that once the conditions prescribed by international law for statehood have been complied with, there is a duty on the part of existing states to grant recognition. This is because, in the absence of a central authority in international law to assess and accord legal personality, it is the states that have to perform this function on behalf, as it were, of the international community and international law (Lauterpacht 1947, cited by Shaw 2003, 372-373). Vis-à-vis the constitutive theory stands the declarative theory on state recognitions. Practice regarding recognitions of states during the XX Century suggests that recognition plays more than a role of evidence (Grant 1999, 22). The declarative theory has an opposite

approach and is a little bit more in accordance with the practical realities. This holds the attitude that recognition is mainly acceptation of a situation that actually exists. A new state will acquire capacity in international law not by virtue of the consent of others but by virtue of a particular factual situation (Shaw 2003, 369). Unrecognized states are quite commonly the object of international claims, charges of aggression, and other breaches of the UN Charter, by the very states refusing recognition (Brownlie 2003 ,87).

The declarative theory is more legitimate and more responsive to the requests and the international reality. With its recognition, a state declares that according to its opinion, new state fulfills conditions of statehood, which international law prescribes (Gruda 2007,79). But there is also an important opinion according to which "actual practice leads to a middle position between these two perceptions" (Shaw 2003, 369). Recognition is simply an act of discretion of an individual state to recognize or to reject the new state. Thus, recognition is a simply political act comprised by a state's decision on recognizing or not recognizing other state an act which is a simply and this has not to do with the arbitrary act of a determined state.

The recognition consists of various forms. Amongst the most mentioned are *de facto* and *de iure* recognitions. Division into these forms has no determined character because the international law has no clear norms related to this. *De facto* recognition is not a complete recognition and it is a temporary one. A state that at accords *de facto* recognition shows in this way its desire to enter into limited, incomplete, and unsustainable relations with the new state relations because of the stance that the new state is not well consolidated. If the new state is not able to prove itself and disappears, the state which has done *de facto* recognition revokes it (Puto n.d., 177). *De facto* recognition involves a hesitant assessment of the situation, an attitude of wait and see, to be succeeded by *de jure* recognition when the doubts are sufficiently overcome to extend formal acceptance (Shaw 2003, 382). *De iure* recognition is considered to be a complete recognition. A state which accords this type of recognition expresses this through a formal act and in principle this is an unrevoked recognition. Nonetheless, in the political sense recognition of either kind can always be withdrawn: in the legal sense it cannot be unless a change of circumstances warrants it (Brownlie 2003, 91). In the modern international law the tendencies of removal of the differences between two recognitions are noted, because the use of *de facto* recognition has made possible appearance of bargaining on recognition or rejection of the new states. To new states there are set up preconditions (conditional recognition) which they have to fulfill before the recognition is granted. In the process of Declaration of independence and the recognition of states (including the Kosovo case) we will find classical, modern and post-modern approaches within the international community (Rrahmani and Belegu 2013, 159-160).

Supporters of the classic approach on self-determination oppose Kosovo's right of self-determination with the justification that the process of self-determination has been finished with the end of the decolonization and Kosovo was not a colony. The content of international law about the self-determination traditionally was limited to the situation of decolonisation. During the process of dissolution of Yugoslavia the right of self-determination broadened to a clear non-colonial context (Castellino 2000 as cited in Ryngaert and Sobrie 2011, 19). This is because the international law could not remain constantly static and unchangeable. On the other side the right of self-determination of the people of Kosovo is opposed in the basis of the judicial constructions from the Yugoslav Constitution, according to which only nations and nationalities have the right of self-determination. According to them the international law, the right of self-determination is given to nations and republics only. According to this interpretation, Kosovo Albanians would have the right of internal self-determination, but not the right of external self-determination. Some arguments against the Kosovo independence underline that Kosovo had no right to exercise the right of self-determination as the republics had. However, it should be noted that republics did not expressively have this right since this right did not rely on the territory. The argument relies on the differences between "constitutive" nations and "non-constitutive" ones and nationalities (narodnosti). This principle actually was not adequate and it was fluid, thus consequently counterproductive and this is seen from the Serbian pretensions to gain within its territories parts of Croatia and other parts of Yugoslavia. Consequently, this was not taken seriously by "constitutive" nations when they had minorities in any other republic (KIPRED 2007, 7).

A state is a factual creature and only when it fulfills determined conditions we can talk about its international subjectivity, whereas it could occur by secession, by an agreement, and also through the process of dissolution of an entity as it was the case with the former Yugoslavia, etc. New norms of international law ease the process of arguing the statehood and thus they call on creation of new criteria and especially norms needed to deal with the cases of secession of states from the systems being dissolute. And norms, categories and the norms of moral are various. After all, the NATO intervention in Kosovo shows "an increasing consensus regarding existence of an unaccepted gap between what is the international law and that of what moral requires" (Buchann, as cited in Holzgrefe and Keohane 2003, 130).

The European Community has issued The Declaration on Yugoslavia by which the community and the Member States agree to recognize Yugoslav republics only when they fulfill some determined conditions. If these republics requested recognition, the conditions to be fulfilled were: acceptance of the Guidelines disposals of the Conference draft convention on Yugoslavia, especially human rights and national rights of ethnic groups; and support of the efforts of the UN Security Council and the

Conference on Yugoslavia. The community and the Member States have also requested Yugoslav republics that seek recognition to give constitutional and political guarantees in order to ensure that there will not be territorial claims to the neighboring states (Shaw 2003, 375). At this stage of development, Kosovo was treated differently, even though it requested international recognition.

SUI GENERIS CASE

The statement of the US Secretary of State in the occasion of Kosovo recognition given on February 18, 2008 reads:

> Not an usual combination of factors are found in the situation of Kosovo – including the context of dissolution of Yugoslavia, the history of ethnic cleansing and crimes against civilians in Kosovo and an extended period under the UN administration – these are not found anywhere else, therefore this makes Kosovo special. Kosovo could not be seen as a precedent for any other situation in the today's world." (www.state.gov).

The declaration numbered factors naming them "unusual combination" and among other arguments, the history of ethnic cleansing which strengthens Kosovo's right on statehood. The projection of declaring the independence in order to crown the people's aspiration of Kosovo is not entirely unilateral. The essence to treat Kosovo as a special case emerges from the response of the international community and from the effective transformation of Kosovo in an internationalized territory (Stahn 2001, 531-540). The process of preparation for declaring independence, the date, and the scenario of declaring independence have been arranged in accordance with the international community, or differently said, with the key decision making factors.

In the case of Kosovo we should take into consideration that it is a *sui generis* case based on the specific circumstance that lead towards the Declaration of independence. These circumstances are the autonomous status of Kosovo in former Yugoslavia and later the systematic violation of human rights, the humanitarian catastrophe, the refusal of the Rambouillet Conference, etc. According to the UN Security Councils Resolutions, chapter VII of the UN Charter, despite the nine years of international administration, there was a lack of agreement between the key actors in order to ensure a sustainable level of autonomy for Kosovo, as well as lack of the responsibility for peace and stability in the region (Written Contribution of the Republic of Kosovo to ICJ 2009, 60-61).

When the independence of Kosovo the Kosovo is opposed, the term "unilateral declaration of (Kosovo's) independence" is usually used but the Declaration of independence was not a pure unilateral act. This act followed a series of coordinated

international acts and deeds to make Kosovo sui generis case that derives from the nonconsensual process of dissolution of Yugoslavia, and that is not a precedent for any other situation" (Kosovo Declaration of independence, 2008). Whereas the armed conflict and the war in Kosovo have ended and this was concluded with the international administration in Kosovo according to the UN Security Council Resolution 1244, Resolution 1244 has left open doors for all options from independence up to restoration of Serb power" (Gruda 2005). The coordinated Declaration of independence is a result of fulfillment of set conditions within Kosovo. Standards before status, the Kei Eide Report on evaluation of standards, negotiations mediated by UNOSEK and issuance of the Comprehensive Proposal for the Final Status (Ahtisaari Plan) are some of the main conditions that proved Kosovo's maturity for establishing the final statehood, which was recognized internationally.

The conditions and the obligations that were fulfilled by Kosovo have also proven the commitment to act continually in total accordance with all international acts, starting with the UN Charter. The independence and its declaration "was very interesting because no state in the Council except Russia and Serbia did not state that independence was an international illegal act that should be opposed by the organized international community, for example, through collective non-recognition policy or even through sanctions" (Weller 2011, 437).

The Declaration of independence was in accordance with the international law and this was confirmed by the International Court of Justice when it decided that "Kosovo's Declaration of independence was not in opposition with the international law". (ICJ 2018). By confirming that the international norms of the international law were not violated, the court treated the issue of the recognition of the state of Kosovo as a political issue (ICJ 2018) that should be treated individually by the states. This is a natural aftermath because recognition is a public act of one state – it is an optional and political act and the state has no legal obligations regarding this (Brownlie 2003, 89).

RECOGNITION AND THE REMEDIAL SELF-DETERMINATION

In favor of the Kosovo's right of statehood and in favor of that, that Kosovo had the right to declare independence is also a notion that today is known as "remedial self-determination". This doctrine comes in two variants: the lack of representation on one side, and repression on the other side (Weller 2011, 441). In the case of Kosovo under the Yugoslav Federation, most of the time the people of Kosovo were not represented and were treated as second hand citizens. Moreover, they were excluded from their rights. When the continual systematic violence and repression are added to this as well, it is clear that the right of self-determination, which belonged to Kosovo, was inevitable. The doctrine of the remedial self-determination is based on the general principle of

justice *ubi ius ibi remedium*. This means if self-determination is present, a solution and an instrument to exercise this right must be there to. An argument about the means is clearly illustrated by the words of Ryngaert and Griffionen:

> What if a state persistently denies the fundamental rights from the internal self-determination? What if people cannot select freely and they are subject of violence and they endure huge violations of their basic rights, whereas all possible means for peaceful solution of the conflict are exhausted? Should we forbid this people to find choice for self – help in form of external self determination (Ryngaert and Griffionen, as cited in Vezbergaite 2011, 44).

The answer is automatic and logical: we cannot and there are no international norms that legalize and justify violence and oppression of others because they have different language, culture, origin, tradition, etc. And those who were under the systematic violence and who were excluded from their rights cannot be deprived of the right of remedial self-determination. And despite the fact that Kosovo with its constitution is established as a state of citizens, Albanians were always the majority and this is an additional argument to justify independence. It is now seen that the modern international law is not comprised of entirely static norms. This has entered into a process of changes that are affected by the situation within the international community as well. The international law has increased the number of international subjects in the same way it has also enriched the attitudes and the criteria with the possibilities of creating new states and their international recognition. Thus, some of the new criteria that are added to the international law are: the human rights and the level of democratic development, the feasibility of a state, to look differently from *ius cogens*, etc.

IMPORTANCE OF KOSOVO'S RECOGNITION

The recognition of Kosovo remains to be very important in terms of the economic and political impact. Two very important mechanisms of the international community have still not recognized Kosovo: the UN and the EU. Regarding the UN it is important to consider the following:

> The recognition of a new State or Government is an act that only other States and Governments may grant or withhold. It generally implies readiness to assume diplomatic relations. The United Nations is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government.

> As an organization of independent States, it may admit a new State to its membership or accept the credentials of the representatives of a new Government (UN 2018).

Analyzing this, we see clearly that the membership in the UN has to be fulfilling some specific conditions and to be undergoing through some concrete steps in regard to the procedure. In regard to the procedure it is as follows:

> The State submits an application to the Secretary-General and a letter formally stating that it accepts the obligations under the Charter.
> The Security Council considers the application. Any recommendation for admission must receive the affirmative votes of 9 of the 15 members of the Council, provided that none of its five permanent members — China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America — have voted against the application.
> If the Council recommends admission, the recommendation is presented to the General Assembly for consideration. A two-thirds majority vote is necessary in the Assembly for admission of a new State.
> Membership becomes effective the date the resolution for admission is adopted (UN 2018).

Kosovo has still not reached the 2/3 of the General Assembly. Thus it is clearly seen how important is for Kosovo to ensure more recognitions. On the other side, the membership to the EU is quite different.

ECONOMIC IMPACT OF THE RECOGNITION OF KOSOVO

It is clear that the recognition of a state "can have concrete economic impacts" (Brookings 2018). The impact in this field varies and it is manifested in various forms. It could derive from technical components and it could be very substantial. A Kosovo businessman, for example, regardless of his economic strength faces difficulties to travel in the countries that do not recognize Kosovo. If a company from Kosovo intends to enter into the business relations with a company from the countries that oppose the recognition of Kosovo, then the both companies would find themselves in a quite difficult situation. This can be explained in the following manner:

> Kosovo's contested status creates challenges for its businesses, from difficulties of travel to complication in the exchange in goods and services. For example, until recently, Kosovo did not have a postal system. Instead, the Albanian postal service would receive post from abroad and

> deliver it to Kosovo, making sending and receiving goods difficult. Money transfers were also problematic, as Kosovar banks have only recently been assigned the SWIFT codes that are needed for international transactions. Until this happened, firms used intermediary banks, a practice that meant additional administrative procedures, restricted availability of online transactions, and increased costs. Access to essential business services like postal delivery and money transfers is regulated by legal agreements that often make such services available only to states officially recognized by the U.N. The inability of businesses from Kosovo and other nations that are not universally recognized as states to access these services increases time and costs of trade and companies their ability to engage in international trade (Brookings 2018).

Regardless of gaps and the changes within the international community, etc., the Ministry of Foreign Affairs states that:

> International recognition of the independence and sovereignty of Kosovo will remain a priority of the Ministry of Foreign Affairs. The process of Kosovo's recognition has shown that Kosovo is an irreversible reality and an essential factor to the peace and stability in the region (MFA – KS 2018).

CONCLUSIONS

The recognition of Kosovo by the international community is very important. The development of various activities remains a priority for the Government of Kosovo and especially for the Ministry of Foreign Affairs. Kosovo exists for ten year as an independent state. The process of Kosovo's recognition as an independent state has been initially intensive and Kosovo managed to gain recognition by almost all Western democracies. It was expected that the countries that did not recognize Kosovo, would have no hesitations to do so after the opinion of the International Court of Justice regarding the right of Kosovo of self-determination. By IJC opinion it was confirmed that Kosovo Declaration of independence was not a violation of the international law. However, this did not happen in fact. The process of Kosovo's recognition is facing stagnation. The reasons for this vary. They can be categorized as internal and external. Internal are those that are basically related to the capacities of the state organs to work more effectively. International are those related to the states that oppose the recognition of Kosovo and other states not to recognize Kosovo as well. Serbia has proven itself as very active in the lobbying against the recognition of Kosovo. The institutions authorized to lobby for recognition by as many states as possible did not the

opinion of the ICJ regarding Kosovo's Declaration of independence as needed. While lobbying, this opinion should have been used more and therefore better presented to the countries that hesitate to recognize Kosovo. The process of negotiations with Serbia in Brussels is something that might have slowed down the process of recognitions. This is because a perception (this needs to be studied more deeply) that countries wait for the final agreement between Serbia and Kosovo. In some cases there was not enough and proper coordination between the Kosovo institutions that are compete to deal with the foreign policy. The coordination in some cases was not well organized even when Kosovo had to deal with the so called "homework activities". For example, the case regarding the demarcation of the border with Montenegro, which was set as a condition to be fulfilled so Kosovo citizens could enjoy visa-free regime. The lack of qualified diplomatic staff is also something that Kosovo still faces. The dialogue between Kosovo and Serbia facilitated by the EU has indirectly slowed down the recognition process since some non-European states may wait until the negotiations end. This is because of the created perception that something could change. Serbia especially lobbied in order to convince these states not to recognize Kosovo. Of course, Russia's refusal to recognize Kosovo has also at least indirect impact on the determined states.

The Kosovo institutions should urgently evaluate the process of recognition in order to find out the main obstacles that seem to stand in its way. The clear division of duties should be more precise within the country in terms of determining who is more responsible to deal with lobbying. A special task force within the Ministry of Foreign Affairs that would work on the recognition process may be a good mechanism that can help this ministry. The composition of this task force should be combined on national and international level. Basically, members of this task force should be diplomats of career, as well as academicians. Their work should be continual and intensive. They can produce reports, analysis, and they can come up with proposals for the ministry. Countries as Macedonia, Croatia, Montenegro, Albania, and Slovenia can serve quite well in the world arena, convincing other state that the recognition of Kosovo contributes to the peace and the stability. These countries' diplomats could be great and helpful mechanisms. Kosovo should be very proactive in working with these countries by developing joint activities and promoting cooperation and peace in the region. Kosovo should find all possible ways to be present in all events, i.e. events with regard to education, science, business, etc., organized by the states that did not recognize Kosovo, so the Kosovo representatives may address and reach their governments and public as well. 

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HANDBOOK ON COHESION POLICY IN THE EUROPEAN UNION

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Cohesion Policy (CP) is one of the most researched EU policies in the EU Studies political science literature reaching almost one million results on Google Scholar[1], at a simple search. The volume *Handbook on Cohesion Policy in the EU* edited by Simona Piattoni and Laura Polverari and published in 2016 is representative for the prolific literature which has emerged in the last 30 years, demonstrating the constant interest of scholars for this evolving key policy of the EU. Given this strong concern of the academic community and its relevance for public and private actors, the decision of Edward Elgar to publish a handbook dedicated entirely to this multi-faceted policy, comes as no surprise, especially as this Publishing House has produced in the recent past two other definitive handbooks related to the topic of this current volume: *Handbook on Multi-level governance (Enderlein, Wälti and Zürn, 2015)* and *Handbook of European Policies* (Heinelt and Münch, 2018), part of the *EU politics and public policy* series.

[1] 893.000 results, using the search term Cohesion Policy

This thick volume is the outcome of two years of work; structured in five parts and 32 chapters it is an ambitious intellectual effort to provide a thorough review on Cohesion Policy. It offers its readership, whether specialized or not, the necessary background and tools to grasp this key EU policy: historical and current perspectives to CP, the question of the interdependence between CP and other EU policies, evaluations of the network of actors involved in the policy-making process and affected by Cohesion policy; theoretical instruments to the study and research of CP, empirical chapters, case studies on the EU member states, as well as documentation of the current and subtle debates of CP.

In order to reach the goals of the book, the editorial team has designed the book along several innovative lines with the methodological approach of this volume consistently defined. The book includes a mixed authorial team of academic scholars and high ranked policy-makers (a former European Commissioner for Regional Policy as well as Heads of Division/Office in the European Investment Bank or in the European Court of Auditors or Committee of the Regions). Second, the topics are addressed by employing perspectives from various disciplines, with preferences from the fields of political science, economics, geography, spatial planning or the evaluation literature, showing the multiple implications of the policy and its relevance for other areas of knowledge. Third, the book draws its analysis on consistent primary data, evaluations, policy documents or maps on territorial convergence. Also, the editors paid careful attention to the design of the chapters, with explanatory tables, textboxes or figures facilitating a deep understanding of the topics addressed in the studies. Assuring a strong correspondence between the topics of the chapters located in different sections of the volume constitutes another strong point of the book.

The strength of this book originates in the design of the book and the selection of the topics to be tackled by the contributors. The Handbook dwells in the analysis on Cohesion Policy with two introductory chapters on the history and evolution of Cohesion Policy and a summative examination on the role of institutions and procedures which aim to familiarize the audience with this theme and provide the necessary knowledge for the more inexperienced readership. A second objective that these first chapters serve is to connect them with the more in-depth studies of the book. A plus of these chapters is that they include an up to date account on the evolution of Cohesion Policy, including the latest rounds of reform- the 2014 moment- as well as coverage of not only the classical institutions associated with CP, but also bodies which are less addressed in the academic literature, the European Investment Bank or the European Court of Auditors. The final section of Part 1 is dedicated to the theoretical perspectives to Cohesion Policy, starting with a selection of the dominant approaches: Economic theory, Multi-level governance and Europeanization.

The usefulness of these chapters resides in presenting the influential theoretical frameworks in the study of Cohesion Policy; but the authors do not resume to a descriptive exercise, but go a step further and identify the gaps in the academic literature and present future directions of research, offering researchers the opportunity to find new research problems to examine and apply the theoretical frameworks to new case studies.

Pleading for the political and complex character of this policy, as Piattoni and Polverari note in their introductory piece, several authors further define and explain the politicization of the policy, as the difficulties encountered in the process of reform and the financial implications of this policy; thus, the logic sequence in the transition from part one of the book to the next section, was to engage with the mobilization of actors in the context of Cohesion Policy. It covers the institutions involved in CH as well as the sub-national interests. The forte of part two, *The Politics and Institutions of Cohesion Policy*, lies in the evaluation approach of the established institutional actors of Cohesion policy; rejecting a descriptive approach of their competences, the chapters explore the role of the EU institutional decision-making triangle as well as the advisory bodies (Committee of the Regions), grouped around a joint theme: their contribution to shaping the Cohesion Policy in the context of the successive rounds of reforms, emphasizing on their agenda within the 2014-2020 negotiations. A second strong point is given by the two chapters dedicated to the non-traditional actors to Cohesion Policy, the European Investment Bank and European Court of Auditors, which do not benefit of great exposure in the literature. One of the explanations that can be brought forward is that the interest for EIB as a relevant actor in CP, gained in importance in the academic literature only in the last years, in the context of the financial crisis of 2008, but the gap persists, with a limited number of studies exploring the connection between Cohesion Policy and EIB. In the case of the European Court of Auditors, it is an institution which over time has been constantly empowered, due to the adoption by the European Commission of new public management principles, where financial performance and the culture of audit are key issues.

At first glance, *Part 3 Cohesion Policy and the Member States*, seems to be too concise for such a laborious task, if we judge in terms of the number of chapters allocated to this section (5 chapters[2]); but after careful analysis, one can understand the significant contribution it makes to the book, by bringing forward relevant data on the countries under scrutiny, using the comparative method; it required rigorous editorial work to organize in a coherent and structured manner the case of the 28 member states and the complex implementation process of CP with its challenges and pitfalls in just one book section(all five chapters share a template with similar issues to be

[2] All the other parts of the book include more than 5 chapters. Part 1 has 6 chapters, Part 2 has 8 chapters, Part 4 has 7 chapters and Part V has 6 chapters.

investigated). The method embraced by the editors was to group these countries under five headings, combining the geographical vicinity with additional innovative criteria: the southern periphery, the service economy in the north, the richest central regions, the sparely populated countries and the case of Central and Eastern Europe. What is innovative, is that it stands out as a singular publication in the landscape of Cohesion Policy scholarship, addressing the case of all EU member states in one book, while other studies have preferred to adopt a regional approach; the case of the Southern Periphery or the Central Eastern European states after the "big-bang" enlargement, enjoy great interest on the research and publication agenda of Cohesion Policy scholarship.

Part IV, *Cohesion Policy and Broader European Strategies* and Part V, *Critical Perspectives and Debates* explore the more sophisticated themes in Cohesion Policy. A thematic pillar of Part IV concerns the intellectual evolution of CP; adopting the public policy cycle approach with a focus on the formulation stage, several chapters explain the advancement and incorporation of new concepts and themes on the agenda of Cohesion Policy: smart specialization, green economy or the urban dimension are some of the issues that are thoroughly investigated. A second issue related to the policy-making process is that multi-level governance structures create challenges to effective policy coordination, which in the case of Cohesion Policy is critical, as its success rests on the contribution of complementary policies to fulfilling its economic, social and territorial mission, showing the interdependence between EU policies. This issue is investigated in chapter 20, where the author tries to encapsulate the relation between Cohesion Policy and agricultural and rural development policies. He argues that the EU needs to increase the spending coordination mechanisms and give up the policy of merely shifting resources from one area to the other. The last chapter of Part IV picks up the story of Europeanization initiated in chapter 5, *Cohesion Policy and Europeanization*, and opens the discussion on the issue of external Europeanization of the Eastern neighborhood, a topic under the radar of scholars; the author argues that the current challenges in the Eastern European region have frozen the Europeanization process and the EU needs to re-launch this process by redesigning its policy and instruments towards the countries of Eastern Europe.

In the final section of the book, *Part V Critical Perspectives and Debates*, Cohesion Policy is assessed against its mission to provide economic and social cohesion, thus, questioning the overall effectiveness of this policy and its impact at territorial level. Particularly relevant is the methodological chapter on the issue of impact evaluation; valuable not only to an academic audience, but especially to the professional evaluation community, the author argues that the lack of a common agreement among scholars on the positive results of CP is influenced by two types of factors: the complexity of the policy and the data and methodologies used in quantitative impact evaluation. The

added value of these final sections of the Handbook is supported by the research problems selected for analysis and the quality of the argumentation; it represents a new step in the evolution and enrichment of the scholarly debate.

What are the shortcomings of the book? As it is one of the first Handbooks on Cohesion Policy which aims to fill specific gaps in the academic literature and present future directions of research, one limitation relates to the role of institutional actors. A relevant topic which is missing from the analysis is the issue of anti-fraud, as Cohesion policy is prone to creating new opportunities for corruption and fraudulent behavior. As the institution of the European Court of Auditors (ECA) is analyzed in the second part of the book, the editors could have opted to examine the audit and anti-fraud issue in a singular chapter, giving space of analysis to the European Anti-Fraud Office (OLAF), which coordinates closely with the ECA and supports the Commission in designing anti-fraud policies; OLAF is another body which is understudied and researched, thus, filling an additional gap in the literature. An alternative solution to overcome this weakness would have been to scrutinize the issue of anti-fraud in *Part V of the book*, *Critical perspectives and Debates*. A second flaw of the book worth mentioning, relates to the two empirical articles of this volume. Included in distinct parts of this handbook (chapter 6 and 14), but interlinked, both chapters examine the issue of the role played by the Structural Funds at regional level. Chapter 6 questions the factors which determine the allocation of Structural Funds at regional level, by emphasizing on the quality of regional government as an explanatory variable, which is tested to illustrate the variation across EU regions, while chapter 14 tackles the question of the influence of Structural Funds allocation on the European Integration attitudes of regional parties. Using a quantitative approach, with valuable results and filling new gaps in the research on CP, the minus of both chapters is that the dataset covers the timeframe of 1989-2000, focusing only the old member states, excluding from the investigation the new developments which occurred after 2008: the financial crisis and its effects (e.g. rise in Euroscepticism) or the case of the new member states. Extending the analysis to the 2007-2013 programming period, would have confirmed the results, show a variation or strong contrast with the anterior time spans. Probably, limitations of available sources of data have played a significant role in the decision to draw on data which explained an empirical reality representative for more than a decade ago.

In sum, the book delivers on its promise to produce a comprehensive handbook on Cohesion Policy. It stands out in the plethora of studies published on the case of this abundantly researched topic; in an inventory of the books published in the last 10 years, one can notice the academic trend to the study and research of CP: emphasis on the origin and historical evolution of CP, accompanied by the successive rounds of reforms and their budgetary implications and second, prominence of specialized analyses shaped by political, economic and social contexts (reform of the

policy, enlargement process, etc.). Thus, it clearly distinguishes itself from other contributions in the field, as it offers the proper set of conceptual, theoretical and empirical tools and instruments necessary to equip a researcher in the study and investigation of different features of CP.

Concluding, this book was written with several audiences in mind, with the editorial team advancing a reading map and suggestions for the navigation through the chapters in line with the targeted audience. A first category that benefits from the results of this book is represented by students. Undergraduate and graduate students enrolled in EU Studies or Public Policy programs - where EU Policies courses are offered in the curricula-will find this book very useful, especially the introductory and theoretical chapters or the case studies examining the role of Cohesion Policy in the EU member states. Scholars with research interests in the field of Public Policies can use this handbook as a valuable teaching resource and make use of the current themes in the critical debates chapters. And not lastly, it is useful for practitioners, for bureaucrats or EU affairs policy advisers employed at local, regional or national level, interested in consolidating their expertise.